Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JOSEPH F. ISTVANIK,

Petitioner,

v.

OFFICER MICHAEL ROGGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to 42 U.S.C. § 1983, the determination of whether a public official is entitled to qualified immunity involves a two-step process. First, it must be determined if the government officials conduct violated a constitutional right. If a violation can be made out, the court must then determine if, at the time of the incident, the right was "clearly established". In the instant case, the jury determined that tightly handcuffing the Petitioner, an arrestee, to the leg of his jail cell cot for several hours violated the Fourth Amendments proscription against unreasonable force. In light of the jury's determination, all of the issues raised by Petitioner involve the second prong of the qualified immunity analysis.

1. Was it "clearly established" at the time of the incident that tightly handcuffing the Appellant to the leg of his jail cell cot for several hours constituted unreasonable force when there was no Third Circuit Court of Appeals decision addressing the issue but the majority of the circuit courts of appeals that had addressed the issue had found similar conduct unconstitutional?

2. Did the District Court and the Third Circuit Court of Appeals commit an error of law when, in determining if the right was "clearly established", they ignored the weight of the case law finding similar conduct unconstitutional?

3. When determining if a right is "clearly established" for purposes of the qualified immunity analysis, absent any circuit court precedent in the circuit in which the case arose, what weight is to be accorded the various court decisions from other circuits that have addressed the issue?

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The opinion of the Third Circuit Court of Appeals, which was unpublished, was filed October 28, 2002. The Order denying Petitioner's Petition for a Panel Rehearing and Petition for a Rehearing En Banc was entered on December 23, 2002.

The Memorandum and Order of the District Court granting Officer Rogge's Post Trial Motion on qualified immunity grounds was entered on August 23, 2001; it is unpublished.

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered its Order denying the Petitioner's Petition for a Panel Rehearing and Petition for a Rehearing En Banc on December 23, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides in pertinent part that the people have a right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures". U.S. Const. Amend. IV. The Fourth Amendment is applied to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Petitioner, Joseph Istvanik, was arrested on September 9, 1997 for Driving Under the Influence of

Alcohol and taken to the holding cell at the Lower Gwynedd Township Police Department. The holding cell was equipped with a surveillance camera, and the Petitioner found a spot in the cell that was out of camera view and stayed there. On more than one occasion, Officers from the Lower Gwynedd Township Police Department told the Petitioner to move into the camera's view so they could monitor him. The Petitioner refused and Respondent, Officer Rogge, entered the cell and handcuffed one of Mr. Istvanik's wrists to the leg of the jail cell cot. At the time he was handcuffed, the Petitioner informed Officer Rogge that he had a number of disabilities and that the position on the floor was uncomfortable and painful.

Even though he was handcuffed, the Petitioner was able to roll under the cot out of the camera's view. After warning Petitioner about rolling under the cot, Officer Rogge reentered the cell and removed the original handcuff. He then placed the Petitioner in a double handcuff configuration. This amounted to placing the Petitioner's arms behind his back, placing one set of handcuffs on each wrist, and then taking a second set of handcuffs and fastening one end to the handcuffs on the Petitioner's wrist and the other to the leg on the cot. This forced the Petitioner into an uncomfortable position on the floor. Petitioner again informed Officer Rogge that in light of his disabilities the position was painful. He also informed Officer Rogge that the handcuffs were too tight and causing pain. Officer Rogge did not adjust the handcuffs to alleviate the pain.

Petitioner was required to remain in this painful position for several hours. As a result of being tightly handcuffed in that painful position for several hours, the Petitioner sustained permanent injuries, including radial

nerve palsy of the right wrist, radial neuropraxia of the wrist, reflex sympathetic dystrophy, flexor tenosynovitis of the fourth and fifth digit with extensor weakness, and synovitis to the wrist. The jury found that tightly handcuffing the Petitioner to the leg of the cot for several hours constituted unreasonable or excessive force in violation of his rights under the Fourth Amendment, and awarded the Petitioner fifty-five thousand dollars ($55,000.00) in damages. Respondent, Officer Rogge, filed a Motion for Post Trial relief pursuant to Federal Rule of Civil Procedure 50(b), claiming that he was entitled to qualified immunity[1].

By Memorandum and Order dated August 23, 2001, the District Court granted the Respondent's Motion. Petitioner then appealed to the Third Circuit Court of Appeals, which affirmed the District Court's Memorandum and Order. Subsequent to the Third Circuit's decision, the Petitioner filed a Petition for a Panel Rehearing and Petition for a Rehearing En Banc, which were denied.

A. District Court Decision on Post Trial Motion.

In addressing the issue of qualified immunity, the District Court acknowledged that the first prong of the analysis - - whether the facts establish that Officer Rogge's conduct violated a constitutional right, had been resolved in the Petitioner's favor "by the jury's finding that Officer Rogge's actions constituted excessive force in violation of the [Petitioner's] Fourth Amendment rights." App. 26a. Accordingly, the District Court only addressed the second prong of the qualified

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[1] Respondent had also filed a 12(b)(6) Motion to dismiss on the grounds that he was entitled to qualified immunity. This Motion was denied.

immunity analysis, which, as the Court correctly noted, requires a determination of whether, at the time of the incident, the right was clearly established. Applying the standard articulated by this Court in *Saucier*[2], the District Court observed that the determination of whether the right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition", and requires that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 201-02; App. 27a.

In determining whether it was clearly established at the time of the incident that tightly handcuffing a person, in a painful and uncomfortable position, to the leg of a jail cell cot for several hours violated the constitution, the District Court limited its analysis to a review of case law. Finding no Third Circuit Court of Appeals decision on point, the District Court cited three (3) Ninth Circuit Court of Appeals decisions and one (1) Sixth Circuit Court of Appeals decision that held that handcuffing a person too tightly constitutes excessive force. *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000); *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997); *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993); *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989). App. 29a.

The District Court also cited one (1) Fifth Circuit Court of Appeals decision, one (1) Tenth Circuit Court of Appeals decision, and one (1) Eighth Circuit Court of Appeals decision, for the proposition that tight handcuffing does not constitute excessive force. *Glenn*

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[2] *Saucier v. Katz*, 533 U.S. 191, 201-02 (2001).

v. City of Tyler, 242 F.3d 307 (5th Cir. 2001)[3]; *Greiner v. City of Champlin*, 27 F.3d 1346 (8th Cir. 1994)[4]; *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990). In addition to these decisions by Federal Court's of Appeal, the District Court cited to three district court cases that had addressed the issue. *Hoffa v. Township of Colebrookedale*, 1999 WL 55171 (E.D. Pa. Jan. 15, 1999)(granting qualified immunity for tight handcuffing)[5]; *McPherson v. Auger*, 842 F.Supp. 25 (D.Me. 1994) (denying qualified immunity for tight handcuffing); *Cooper v. City of Virginia Beach*, 817 F. Supp. 1310 (E.D. Va. 1993)(granting qualified immunity for tight handcuffing where injuries were limited to bruising and welting). App. 29a-30a.

Based on the above case law, which the court deemed to be the controlling authority on the issue of handcuffing an arrestee too tightly to a cot in a jail cell for several hours, the District Court held that the "law in this area is not clearly established even on a general level". App. 29a. Accordingly, the District Court granted Officer Rogge's Post Trial Motion and held that he was entitled to qualified immunity.

B. The Third Circuit Court of Appeals Decision.

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[3] This case was decided well after the incident which formed the basis of Appellant's complaint and therefore is of no relevance to the qualified immunity analysis. Moreover, the district court's analysis ignores an earlier Fifth Circuit decision in which the Court held that painful handcuffing constituted excessive force. *Heitschmidt v. City of Houston*, 161 F.3d 834 (5th Cir. 1998).

[4] In an earlier case, the Eighth Circuit held that tight handcuffing constituted excessive force. *Bauer v. Norris*, 713 F.2d 408, 410-13 (8th Cir. 1983).

[5] The incident took place on September 9, 1997, so this case is not relevant to the qualified immunity analysis.

On the issue of qualified immunity, the Third Circuit Court of Appeals upheld the District Court's analysis.[6] App. 6a. Specifically, the Court held that "[i]n its analysis of the second step, i.e., whether the constitutional right was clearly established, the district court fully surveyed the state of the law and determined that, at the time of the incident, the question of whether tight handcuffing constitutes a violation of Fourth Amendment rights against excessive force was not established even in the general sense."[7] App. 6a. In light of the District Court's assessment of what it deemed to be the "state of the law", the Third Circuit concluded that "[q]uite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving". App. 6a.

C. Petition for Rehearing.

Subsequent to the Third Circuit's decision, Petitioner filed a Petition for a Panel Rehearing and Petition for Rehearing En Banc in which he argued that the Third Circuit's decision on qualified immunity

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[6] After the Petitioner's Brief and Reply Brief had been submitted to the Third Circuit Court of Appeals but prior to the decision by the Court, this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002) was handed down. A day after the decision in *Hope* was handed down, the Petitioner supplemented his Briefs to the Third Circuit with a copy of the decision.

[7] The Third Circuit Court of Appeals did not conduct its own survey of the law but instead adopted the District Court's assessment. Accordingly, hereafter Petitioner will refer to the District Court's opinion as opposed to the decision by the Third Circuit Court of Appeals.

conflicted with the Supreme Court's decision in *Hope v. Pelzer* and also raised a substantial issue of law regarding the proper approach or standard to be used by the courts when assessing case law from the various circuit courts in an attempt to determine whether a right is clearly established. Petitioner's Petition for Rehearing was denied. App. 39a.

REASONS FOR GRANTING THE WRIT

As was evident from the District Court's decision, there is a split in the various circuits regarding the circumstances in which handcuffing can violate the constitution and also regarding the requirements for stating such a claim.[8] *Compare Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997)(arrestee tightly handcuffed for thirty-five minutes stated a claim for excessive force) *with Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990)(police officers refusal to loosen tight handcuffs did not violate the constitution); *see also Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999)(requiring showing of physical injury to state claim for excessive force for tight handcuffing); *Glenn v. City of Tyler*, 242

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[8] Petitioner acknowledges that this split is in part due to the fact that whether handcuffing constitutes excessive force depends on the circumstances of each case and therefore is not reducible to a general rule applicable to all handcuffing cases. *See Graham v. Conner*, 490 U.S. 386, 396 (1989)("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."). This fact argues in favor of relying on more general principles of law when determining if the right is clearly established in excessive force cases instead of requiring cases with a high degree of factual similarity. *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 2516 (2002)("But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.").

F.3d 307 (5th Cir. 2001)(requiring showing of malice to state a claim for excessive force for tight handcuffing).

In circumstances such as this case, where there is no controlling circuit court of appeals decision in the circuit where the claim arose, there also is a wide split and divergence in the circuits regarding what other case law can be used in determining if a right is clearly established for purposes of the second prong of the qualified immunity analysis. *Compare Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988)(the ninth circuit looks to all decisional law, including other circuit courts of appeal, district court decisions and state court decisions) *with Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988)(the sixth circuit only considers cases from the Supreme Court, the sixth circuit court of appeals and the district court itself); *see generally*, Stemerman, "Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law is "Clearly Established" in the Third Circuit?", 47 Vill.L.Rev. 1221, 1227 (2002)("jurisdictions are divided over the range of courts whose decisions should be considered for clearly establishing a given right"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 n. 32 (1982)("We need not define here the circumstances under which the 'state of the law' should be evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.").

Concomitantly, this split in the circuits regarding the use of case law to determine if a right is clearly established creates a substantial issue of law that requires resolution by this Court. First, because there is such a divergence of approaches being applied by the

courts, whether a public official is entitled to qualified immunity often depends on the situs of the law suit and the particular approach employed by the courts in that circuit. *See generally*, Wilson, "Location, Location, Location: Recent Developments in the Qualified Immunity Defense", 57 N.Y.U. Ann.Surv.Am.L. 445 (2000)(arguing that the particular approach employed by the various circuits is often outcome determinative). It is anathema to our constitutional system of government that geography should determine whether a person has a right to sue for violation of his or her federally protected rights.

Moreover, only this Court can resolve the split among the circuits and establish a standard for all federal courts to follow when determining whether case law supports the conclusion that a right is clearly established. *Brown v. Muhlenberg Township*, 269 F.3d 205, 224 (3d Cir. 2001)(Garth, Circuit Judge, dissenting and concurring)("The Supreme Court has not defined the level of precedent required to render a right 'clearly established'".); Wilson, *supra*, 57 N.Y.U. Ann.Surv.Am.L. at 474 ("I welcome the day when Supreme Court guidance will clarify exactly how circuit courts should address this vexing issue.").

Second, as this case clearly illustrates, the lack of a uniform standard or method of analysis - - the lack of guidance from this court, has left the lower courts with far too much discretion to pick and choose among the various cases when determining if a right is clearly established[9]. This discretion has permitted the lower

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[9] As will be developed in the next section, contrary to the District Court's survey of the law in this case, the weight of the applicable case law unequivocally held that tightly handcuffing a person for several hours under the circumstances in which the Petitioner was handcuffed clearly violates the constitution.

court judges to decide the qualified immunity issue in light of their personal predilections as opposed to sound legal principles. Stemerman, *supra*, 47 Vill.L.Rev. at 1249 ("The absence of a clearly articulated standard, coupled with the highly fact-sensitive nature of the qualified immunity analysis, often allows the philosophical views of the judge or judges hearing the case to decide the outcome."). The split in the circuits regarding the substantive law applicable to this case as well as the split regarding the lower courts use of case law to determine if a right is clearly established, along with the need to resolve the splits and establish a uniform standard or method of analysis regarding the use of case law in the qualified immunity analysis, compel this Court to grant the Petitioner's Writ of Certiorari.

I. THE LOWER COURTS INCORRECTLY HELD THAT IT WAS NOT CLEARLY ESTABLISHED THAT OFFICER ROGGE'S CONDUCT VIOLATED THE FOURTH AMENDMENT.

Although there is a split in the circuits regarding whether tightly handcuffing an arrestee to the leg of a jail cell cot, in an uncomfortable and painful position, for several hours violates the Fourth Amendments proscription against excessive force, the District Court conducted a superficial and incomplete survey of existing case law to support its conclusion that it was not even established in the general sense that Officer Rogge's conduct violated the Fourth Amendment. Contrary to the District Court's conclusion, a review of

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Accordingly, even under a strict standard, the right was clearly established at the time of the incident and Officer Rogge had "fair warning" that his conduct was unconstitutional.

the law supports the conclusion that the right was clearly established.

In it most recent decision on qualified immunity, this Court rejected the notion that in order for a right to be clearly established there must be a case with "fundamentally" or "materially" similar facts holding that the specific conduct in question was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 2516-17 (2002). As the Court held, the issue is whether the public official had "fair warning" that his or her conduct was unconstitutional, and such "warning" can be found in general statements of law. *Hope*, 122 S.Ct. at 2516. Because a factually identical case is not required, a general constitutional rule may provide "fair warning" even in circumstances where the "very action in question has [not] previously been held unconstitutional". *Id. quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Applying these principles, the Court in *Hope* held that it was clearly established in 1995 that handcuffing an inmate to a hitching post for several hours beyond the period of time required to address an immediate threat or danger violated the Eighth Amendment[10]. *Hope*, 122 S.Ct. at 2519.

In the instant case, the jury found that the Petitioner was tightly handcuffed to the leg of his jail cell cot, in an uncomfortable and painful position, for several hours, and that he complained to Officer Rogge

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[10] Significantly, there is no indication in the Court's opinion in *Hope* that the Petitioner in that case was tightly handcuffed. Other than that fact, Petitioner sees little distinction between the conduct found unconstitutional by this Court in *Hope* and the instant case. *Hope*, 122 S.Ct. at 2517 ("Nor . . . is there any reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours.").

and other Officers at the jail about the painful condition. Based on these facts, the jury found that Officer Rogge's conduct constituted excessive force in violation of the Fourth Amendment. Taking these facts and applying them to the second prong of the qualified immunity analysis, the type of case that would have provided an officer "fair warning" that his conduct was unconstitutional would have involved tight handcuffing for an extended time and/or using physical restraints on a person in a jail cell beyond any point in time necessary to address an immediate threat or danger[11].

Contrary to the District Court's survey of the case law, at the time of the incident - - September 9, 1997, the majority of the courts that had confronted facts and circumstances similar to the Petitioners had found that the public officials conduct violated the constitution. Specifically, the Second Circuit had found that handcuffing an arrestee too tightly constituted excessive force. *Davidson v. Flynn*, 32 F.3d 27, 30 (2nd Cir. 1994); *see also Fiacco v. City of Rensselar, New York*, 783 F.2d 319, 322 (2d Cir. 1986)(Court held it was excessive force when arrestee complained of tight handcuffs at the station house but nothing was done about it.); *Casaburro v. Giuliani*, 986 F. Supp. 176, 178, 181

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[11] Being uncooperative is different from posing a threat or danger. Indeed, in *Hope*, this Court recognized that the fact that the inmate had originally been placed on the hitching post because he refused to comply with an order to get off the bus while on the work detail did not justify keeping him handcuffed to the hitching post for several hours. *Hope*, 122 S.Ct. at 2515 (""Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to prison. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period . . .").

(S.D.N.Y. 1997)(Court held it was excessive force where arrestee was tightly handcuffed in standing position to jail cell for seven hours).

The Fourth Circuit had held that tight handcuffing can constitute excessive force where the arrestee has sustained a physical injury. *Carter v. Morris*, 164 F.3d 215, 219 n.3 (4th cir. 1999); *Riley v. Dorton*, 115 F.3d 1159, 1166-68 (4th Cir. 1997); *see also White v. Maryland Transportation Authority*, 151 F.Supp.2d 651, 657 (D. Maryland 2001)("[T]he use of handcuff's and the use of leather strap that White describes cannot give rise to a federal constitutional claim of excessive force where he has made no showing of even a de minimis injury."). In this case, the Petitioner sustained serious physical injuries as a result of the handcuffing and therefore satisfied the Fourth Circuit's physical injury requirement. Moreover, at the time of the incident, a district court in the Fourth Circuit had held that handcuffing an inmate in his cell to restrain or control misbehavior was unconstitutionally excessive. *Landman v. Royster*, 333 F.Supp. 621, 647-48 (E.D. Va. 1971)("Likewise, to restrain or control misbehavior by placing an inmate in chains or handcuffs in his cell is unconstitutionally excessive."); *see also Williams v. Benjamin*, 77 F.3d 756, 764 (4th Cir. 1996)(Using four point restraints on inmates can "impose a significant threat of physical injury"). These cases clearly establish a constitutional rule that provides "fair warning" that tightly handcuffing an arrestee to the leg of a cot, in an uncomfortable and painful position, for several hours, violates the constitution.

The District Court cited *Glenn*[12] as an example of a Fifth Circuit case holding that tightly handcuffing an

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[12] *Glenn v. City of Tyler*, 242 F.3d 307 (5th Cir. 2001).

arrestee does not constitute excessive force. App. 29a. As stated above, *Glenn* was decided in 2001, well after the incident involving the Petitioner, and therefore is of no value to the qualified immunity analysis. Moreover, the District Court ignored an earlier Fifth Circuit case, which was decided before the incident involving the Petitioner, wherein the Court held that tight handcuffing did constitute excessive force. *Heitschmidt v. City of Houston*, 161 F.3d 834, 839-840 (5th Cir. 1998). The District Court also ignored the Fifth Circuits decision in *Gates v. Collier*[13], which held that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" violated the constitution. Both *Heitschmidt* and *Gates* support the conclusion that at the time of the incident, in the Fifth Circuit, it was "clearly established" that Officer Rogge's conduct violated the constitution, and the District Court's holding to the contrary was wrong as a matter of law.

As the District Court recognized, in *Martin v. Heideman*[14], the Sixth Circuit unequivocally held that "excessively forceful handcuffing" constitutes excessive force. 106 F.3d at 1312-13; *see also Kostazewa v. City of Troy*, 247 F.3d 633, 640 (6th Cir. 2001) (Court held that arrestee stated a claim for excessive force where, while being transported to the police station, he complained to police officer that his handcuffs were too tight).

In support of its conclusion that at the time of the incident it was not "clearly established" that tightly handcuffing an arrestee to the leg of a jail cell cot for several hours was unconstitutional, the District Court

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[13] 501 F.2d 1291 (5th Cir. 1974).

[14] 106 F.3d 1308 (6th Cir. 1997).

cited the Eighth Circuit's decision in *Greiner v. City of Champlain.*[15] While Petitioner concedes that *Greiner* supported the District Court's conclusion, the District Court's analysis ignored an earlier Eighth Circuit decision that upheld a jury finding that tight handcuffing constituted excessive force. *Bauer v. City of Houston*, 713 F.2d 408, 410-13 (8th Cir. 1983). Accordingly, the most that can be said of the Eighth Circuit is that at the time of the incident the Circuit was split on the issue of whether tight handcuffing violated the constitution.

As the District Court acknowledged, at the time of the incident, the Ninth Circuit had firmly established that tight handcuffing constitutes excessive force. *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993)(affirming denial of qualified immunity where arrestee complained of tight handcuffs and officer refused to loosen them); *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989); *see also LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000).

The District Court cited the Tenth Circuit decision in *Hannula v. City of Lakewood*[16], for the proposition that tight handcuffing did not violate the constitution. App. 29a. While the Court in *Hannula* did hold that the failure to loosen tight handcuffs did not violate the constitution, it should be noted that the case was decided under a substantive due process theory – not a Fourth Amendment standard, and it weighed the need for force against the extent of injury and motive of the police officer. 907 F.2d at 132. The Court in *Hannula* based its holding on the fact that the arrestee failed to produce any evidence that she was injured as a result of the tight handcuffing and also failed to produce

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[15] 27 F.3d 1346 (8th Cir. 1994).

[16] 907 F.2d 129 (10th Cir. 1990).

any evidence that the Officer acted with malice. *Id.* Both of the grounds on which the Court in *Hannula* founded its decision are not required under the *Graham* excessive force analysis. Accordingly, the decision lends little support to the District Court's conclusion that the right was not "clearly established" at the time of the incident.

Even assuming, *arguendo*, that the Eight Circuit's decision in *Greiner* and the Tenth Circuit's decision in *Hannula* support the District Court's conclusion that the right was not "clearly established" at the time of the incident, court of appeals decisions from the Second Circuit, Fifth Circuit, Sixth Circuit, and Ninth Circuit unequivocally establish that the right was "clearly established". Moreover, constitutional rules developed in the Fourth Circuit also would have provided Officer Rogge with "fair warning" that his conduct was unconstitutional. Accordingly, contrary to the District Court's survey of the law, at the time of the incident five court of appeals decisions support the conclusion that the right was "clearly established" and arguably two support the conclusion that it was not. This was sufficient to provide Officer Rogge with fair warning that his conduct was unconstitutional.[17]

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[17] One post-*Hope* decision that has addressed the issue of whether the right was "clearly established" has balanced the decisions recognizing the right against the decisions that did not recognize the right. *Turner v. Arkansas Ins. Dept.*, 297 F.3d 751, 756-58 (8th Cir. 2002). Because more decisions recognized the ight, the Court held that the officials had "fair warning".

II. THE LOWER COURT'S QUALIFIED IMMUNITY ANALYSIS WAS OUTCOME DETERMINATIVE.

As mentioned above, the lack of any standards regarding the use of case law in the qualified immunity analysis leaves the lower courts with too much discretion to pick and chose cases that it deems relevant. Stemerman, *supra*, 47 Vill.L.Rev. at 1249. This case is a perfect example. In its analysis, the District Court ignored relevant decisions from the Second Circuit, incorrectly relied on a 2001 case from the Fifth Circuit while ignoring earlier, relevant precedent from that circuit, and accorded great weight to an Eighth Circuit decision when that circuit is split on the issue, and also accorded weight to a Tenth Circuit decision that based its decision on a lack of physical injury and a lack of malice. That the District Court's analysis was outcome determinative was clear from its decision.

The Court stated that its qualified immunity analysis was influenced by the fact that "the police were dealing with an uncooperative drunken driver." App. 31a. Likewise, in its affirmation of the District Court's qualified immunity analysis, the Third Circuit Court of Appeals focused on the fact that "it is apparent that [Officer Rogge] was dealing with a thoroughly uncooperative person who had been arrested for drunk driving." App. 6a. What both the District Court and the Third Circuit of Appeals ignore is the fact that the jury had already found that the Officer Rogge's conduct constituted excessive force. In making that determination, the jury had weighed all of the evidence, including the Petitioner's uncooperative behavior, and found that notwithstanding the Petitioner's behavior, it constituted excessive force to leave the Petitioner tightly handcuffed to the leg of a jail cell cot, in an

uncomfortable and painful position, for several hours, when he was complaining of pain. *Hope*, 122 S.Ct. at 2514 (fact that inmate was uncooperative in not getting off bus for work detail did not justify handcuffing him to hitching post for several hours).

The jury having addressed the weight to be given the Petitioner's uncooperative behavior, the only issue for the District Court and the Third Circuit Court of Appeals was whether, at the time of the incident, it was "clearly established" that leaving the Petitioner tightly handcuffed to the leg of a jail cell cot, in an uncomfortable and painful position, for several hours, when he was complaining of pain, was unconstitutional. As the above analysis demonstrates, at the time of the incident the right was clearly established. Accordingly, in terms of the second prong of the qualified immunity analysis, the fact that the Petitioner was uncooperative is nothing more than a red herring, a red hearing that reflects a particular bias on the part of the District Court, a bias that was evident in the Court's survey of the controlling law. This case therefore demonstrates a need for more guidance from this Court on how the lower courts use case law from other circuits when there is no controlling law in the circuit in which the case arose. The need for this Court's intervention is not only demonstrated by this case, but also by the wide split and divergence in the circuits regarding the use of case law to resolve the second prong of the qualified immunity analysis. *Brown*, 269 F.3d at 224 (Garth, Circuit Judge, dissenting and concurring)("In my view, even if non-circuit precedents existed, which they do not, such precedents are non-binding decisions which do not "*clearly establish*" law for purposes of qualified immunity. The Supreme Court has not defined the level of precedent required to render a right "*clearly established*".)(emphasis in orginal); *Johnson v. Horn*,

150 F.3d 276, 286 (3d Cir. 1998), *overruled on other grounds in Dehart v. Horn*, 227 F.3d 47 (3d Cir. 2000)(en banc) ("[T]he courts of appeals are divided as to whether, and to what extent, out-of-circuit decisions may be considered in determining whether the law was clearly established.").

Absent any controlling authority in the circuit in which the case arose, the circuit courts of appeal have employed a wide array of approaches in attempting to determine if case law supports the conclusion that the law was "clearly established" at the time of the incident. Both the Ninth Circuit and the Eighth Circuit take a broad approach, considering all case law, including decisions by the United States Supreme Court, circuit courts of appeal, district courts and state courts. *Hayes v.* Long, 72 F.3d 70, 73-74 (8th Cir. 1995); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988). By comparison, the Sixth Circuit only considers decisions from the United States Supreme Court, the Sixth Circuit Court of Appeals, and the district court itself. *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1171 (6th Cir. 1988).

Likewise, the Fourth and Eleventh Circuits limit their approach to reviewing decisions by the United States Supreme Court, decisions from their respective circuit courts of appeal and decisions from the highest state court in the state in which the case arose. *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998), *cert. denied*, 531 U.S. 1076 (2001)(en banc); *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n. 4 (11th Cir. 1997). The Second, Seventh and Third Circuits will look to decisions by district courts as evidence of the law, but they have held that those decisions can not establish the law for purposes of the qualified immunity analysis. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir.

1995); *Jermosen v. Smith*, 945 F.2d 547, 551 (2d Cir. 1991); *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991).

Obviously, there is a wide divergence in the circuits regarding the use of case law to determine whether a right is clearly established. As a result of this divergence, whether a public official is entitled to qualified immunity may depend on the circuit in which the case arose. Accordingly, a litigant in the Ninth Circuit has a much higher likelihood of recovering damages for violation of his or her constitutional rights than a litigant in the Sixth Circuit. This disparity in outcomes is directly related to a lack of a uniform standard or approach for using case law to determine if a right is "clearly established", and stands contrary to the well-established principle that application of the law should not be arbitrary and capricious. Only this court can resolve this conflict and provide the appropriate guidance.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that this Honorable court grant his Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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(any footnotes trail end of each document)
No: 01-3395, No: 01-3536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH F. ISTVANIK; ELAINE J. PASSALACQUA, H/W,

v.

MICHAEL ROGGE, Officer; JOHN DOE, Officer; KENNETH BRIGHT, Police Chief; LARRY COMMUNALE, Township Manager; LOWER GWYNEDD TOWNSHIP; RICHARD LAWN, Officer; Joseph F. Istvanik, Appellant.

JOSEPH F. ISTVANIK; ELAINE J. PASSALACQUA, H/W v. MICHAEL ROGGE; KENNETH BRIGHT, Police Chief; LARRY COMMUNALE, Township Manager; LOWER GWYNEDD TWP; RICHARD LAWN, Officer; Michael Rogge, Appellant

September 20, 2002, Submitted Pursuant to Third Circuit LAR 34.1(a)

October 28, 2002, Filed

COUNSEL:
For Joseph F. Istvanik, Appellee: Alan E. Denenberg, Abramson & Denenberg, Cherry Hill, NJ, Teri B. Himebaugh, Schwenksville, PA.

For Michael Rogge, Appellant: Walter F. Kawalec, III, Marshall, Dennehey, Warner, Coleman & Goggin, Cherry Hill, NJ.

JUDGES:
Before: SCIRICA, ALITO and McKEE, Circuit Judges.

OPINIONBY:
McKEE

OPINION:

McKEE, Circuit Judge.

The principal issue we must resolve in these appeals is whether the district court was correct in finding that Police Officer Michael Rogge had qualified immunity in this § 1983 civil rights action. For the reasons that follow, we will affirm.

I.

Because we write only for the parties, it in not necessary to recite the facts or history of this case. Rather, it is sufficient to note that Joseph F. Istvanik filed a § 1983 action against Officers Rogge and Lawn of the Lower Gwynedd Township Police Department claiming that they used excessive force by handcuffing him too tightly to the leg of a cot for several hours while he was in a holding cell at the police station. He also asserted state law claims for assault, battery and false imprisonment. Rogge filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), claiming that he was entitled to qualified immunity. However, the district court denied the motion. Rogge also made a motion for judgment as a matter of law at the close of Istvanik's case pursuant to Fed. R. Civ. P. 50(a), asserting, inter alia, qualified immunity.

A jury found in favor of Rogge on the state law claims and in favor of Istvanik on his § 1983 claim. It also found in favor of Lawn on all claims.

Rogge filed a post-trial motion under Fed.R.Civ.P. 50(b) asserting, inter alia, that the district court erred by not granting him qualified immunity. On August 23, 2001, the district court granted Rogge's judgment as a matter of law finding that he was entitled to qualified immunity.

These appeals followed.

II.

The district court, noting that Istvanik had not yet been charged with a crime when his right to be free from excessive force was allegedly violated, held that the Fourth Amendment's "objective reasonableness" standard applied to Istvanik's § 1983 claim. See *Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)*. Therefore, when Rogge first raised the issue of qualified immunity in his Rule 50(a) motion, the district court followed the majority of courts of appeals that had ruled on that issue. The court reasoned that the standard for Fourth Amendment excessive force claims and the standard for qualified immunity collapse into a single objective reasonableness inquiry that must be decided by the jury. Under this majority view, a finding of excessive force precludes a finding of qualified immunity. See *Katz v. U.S., 194 F.3d 962, 968 (9th Cir. 1999)*, overruled by *Saucier v. Katz, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001); Bass v. Robinson, 167 F.3d 1041, 1051 (6th Cir. 1999); Thomas v. Roach, 165 F.3d 137, 143 (2d Cir. 1999); Frazell v. Flanigan, 102 F.3d 877, 886-887 (7th Cir. 1996); Scott v. District of Columbia, 322 U.S. App. D.C. 75, 101 F.3d 748, 759 (D.C.Cir. 1996); Mick v. Brewer, 76 F.3d 1127, 1135 n.5 (10th Cir. 1996); Rowland v. Perry, 41 F.3d 167, 173 (4th*

Cir. 1994). The district court therefore denied Rogge's Rule 50(a) motion and ultimately submitted the issue of his objective reasonableness to the jury. The jury concluded that Rogge used excessive force. Rogge then filed a post-trial motion under Rule 50(b) arguing once again that he was entitled to qualified immunity. However, before the district court ruled, the Supreme Court decided *Saucier v. Katz, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*, in which the Court clarified the relevant analysis. As we noted in *Bennett v. Murphy, 274 F.3d 133, 137 (3d Cir. 2002)*, Saucier clarified that "the immunity analysis is distinct from the merits of the excessive force claim." The two analyses no longer collapse into a single objective reasonableness inquiry for the jury. Instead, claims of qualified immunity arising in the context of excessive force claims are analyzed under a two-step process. The first step is to determine whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation. *Saucier v. Katz, 533 U.S. at 201*. If the plaintiff fails to establish a constitutional violation, the inquiry ends and the officer is entitled to qualified immunity. Id. However, if a constitutional violation could be made out under a favorable view of the plaintiff's submissions, the court must then determine whether the constitutional right was clearly established. Id. The focus in the second step is purely legal. "If it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity." *Bennett v. Murphy, 274 F.3d at 136-137* (emphasis in original).

In adjudicating Rogge's Rule 50(b) motion for judgment as a matter of law, the district court applied Saucier's two-step process and held that Rogge was entitled to qualified immunity, and therefore granted Rogge's motion for judgment as a matter of law. Istvanik now argues that the district court's grant of summary

judgment should be reversed because the district court improperly applied Saucier's two-step analysis retroactively. We disagree.

The majority of the cases upon which Istvanik relies for his retroactivity argument address the retroactive application of a new rule on collateral review of a criminal conviction, and they therefore do not apply in this civil case. Significantly, he ignores *Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993)*, in which the Court held that when it announces a new rule in a civil case it is to be applied to all cases which are on direct appeal. The Court wrote:

When this Court applies a federal rule to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97; see also *Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 131 L. Ed. 2d 820, 115 S. Ct. 1745 (1995)* (affirming rule in Harper).

In light of Harper and the procedural posture of this case, it is clear that Saucier, to the extent that it did announce a new rule, is the controlling law and was properly applied by the district court. Saucier was decided while Istvanik's case was still open in the district court, and Harper requires that a new rule is to be applied to cases still on direct appeal. See *Bennett, 274 F.3d at 136* (Because Saucier was decided while the appeal was pending, we applied Saucier's two-step analysis to the facts before us and remanded to the district court to apply the second step). Therefore, the

district court did not err by applying Saucier's two-step analysis to Rogge's Rule 50(b) motion.

We also reject Istvanik's argument that the district court improperly applied the Saucier analysis. The heart of Istvanik's excessive force claim is that Rogge applied the handcuffs too tightly when he was double-cuffed to a steel cot in the holding cell. In its Saucier analysis, the district court found that the first step was answered by the jury's finding that Rogge's actions constituted excessive force in violation of Istvanik's Fourth Amendment rights. In its analysis of the second step, i.e., whether the constitutional right was clearly established, the district court fully surveyed the state of the law and determined that, at the time of the incident, the question of whether tight handcuffing constitutes a violation of Fourth Amendment rights against excessive force was not established even in a general sense. Therefore, it clearly was not established in the particularized sense required for qualified immunity.

We find no error in the district court's Saucier analysis. Quite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving.

In addition to his arguments centering on Saucier, Istvanik also argues that the district court abused its discretion by weighing evidence, determining the credibility of witnesses and substituting its version of the facts for the jury's when it ruled on Rogge's post-trial motion for judgment as a matter of law. We again disagree.

Istvanik's argument focuses on three sentences in the district court's twenty-five page opinion. The first

sentence is pulled from the middle of a paragraph at the end of the opinion as the district court was summing up its discussion. The district court noted that "there is nothing in Plaintiff's testimony from which this Court can conclude that Plaintiff was repeatedly complaining of pain and Officer Rogge callously ignored these complaints." App. at 37. Istvanik argues that this statement is false because he testified that he was in pain while double-cuffed. However, Istvanik has taken the district court's statement out of context. The district court was referring to the time after Istvanik had been double-cuffed, while he sat on the floor of the holding cell. There is nothing in the record, and indeed Istvanik points to nothing, that suggests that Istvanik complained to Rogge after being double-cuffed and that the officer then ignored the complaints.

Istvanik also challenges the district court's comment that "although he may have been in discomfort, he was only in discomfort because of his persistent refusal to comply with the officer's instructions." App. at 37. Istvanik argues that the district court substituted its version of the facts for the jury's in making this statement because there was expert testimony that his alleged injuries resulted from the double-handcuffing; not his behavior. However, as Rogge aptly says, Istvanik's argument "is a bit like saying that 'it's not the fall that kills you, it's the sudden stop at the end.'" Rogge's Br. at 17. The district court's statement merely recognizes that the cuffing would not have been necessary if Istvanik had cooperated.

Istvanik also argues that it was an abuse of discretion for the district court to note that his blood alcohol level at the time of his arrest was 0.16%. This determination was reached through a Preliminary Breath Test, but it was the focus of a motion in limine that successfully kept it from the jury. Again, the

reference to the blood alcohol level is taken out of context. The district court discussed all of the evidence of Istvanik's inebriation. The reference to his blood alcohol level was but one small piece of support for the undisputed fact that Istvanik was inebriated at the time of his arrest. See App. at 34. That reference to the inadmissible blood alcohol level clearly does not create reversible error. See *Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981)* ("The trial court's reliance on inadmissible evidence will not ordinarily be a ground for reversal if there was competent evidence received sufficient to support the findings.").

Moreover, the issue before the district court was whether, under the circumstances, it had clearly been established that tight handcuffing was a Fourth Amendment violation. This was a purely legal question focusing on the state of the law at the time of Istvanik's arrest. Thus, even if we assume that Istvanik is correct that the district court substituted its version of the facts for the jury's in the three instances he cites, the district court's purported error would not in any way alter the results of the district court's survey of the relevant case law.

Finally, Istvanik claims that the trial judge was biased against him and that this bias is evidenced by the trial judge's evaluation of the facts and the "tone" of the memorandum opinion. Istvanik's Br. at 24. In Istvanik's view, the trial judge was biased because "the trial judge clearly disagreed with the jury's verdict finding that [Rogge] used excessive force." Id. However, the trial judge merely held that the jury's finding that Rogge used excessive force satisfied the first prong of the Saucier analysis and we therefore find no basis for Istvanik's claim of judicial bias.

III.

For all of the above reasons, we will affirm the district court's grant of judgment as a matter of law to Rogge.

CIVIL ACTION NO. 98 CV 4029

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH F. ISTVANIK

v.

OFFICER MICHAEL ROGGE

MEMORANDUM AND ORDER
SURRICK, J. AUGUST 23, 2001

Plaintiff, Joseph F. Istvanik, sued Officer Michael Rogge and Officer Richard Lawn of the Lower Gwynedd Township Police Department claiming that they violated his federal constitutional rights under 42 U.S.C. § 1983 by using excessive force while restraining him in the holding cell at the Lower Gwynedd police station. He also asserted claims for assault, battery and false imprisonment At the conclusion of a trial, the jury returned a verdict in favor of Officer Michael Rogge on the assault, battery and false imprisonment claims, On the § 1983 claim of excessive force, the jury found in favor of Plaintiff and against Officer Rogge and awarded damages in the amount of $55, 000.00. No punitive damages were awarded. The jury found in favor of Officer Lawn on all claims.

Presently before the Court is Defendant Officer Michael Rogge's Motion for Post Trial Relief (Doc. No. 70). The Motion contains a Request for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(b), as well as a Request for a New Trial pursuant to Rules 50(b) and 59(a). Rogge's Motion alleges that the Court committed the following error:

a) That the Court erred by applying the Fourth Amendment's objective reasonableness" standard to Plaintiff's excessive force claim rather than a Fourteenth Amendment "shocks the conscience" or "deliberate indifference standard.

b) That the Court erred by failing to grant Officer Rogge qualified immunity.

c) That the Court erred by failing to strike the verdict as inconsistent and contrary to law.

d) That the Court erred on several evidentiary rulings prior to and during trial.

e) That the Court erred by failing to grant a mistrial based upon opening remarks of Plaintiff's counsel.

For the reasons set forth below, we conclude that we properly applied the Fourth Amendment's "objective reasonableness" standard to Plaintiff's excessive force claim. We further find that Officer Rogge is entitled to qualified immunity.fn1 Accordingly, we GRANT Officer Rogge's Motion for Post Trial Relief and enter JUDGMENT as a matter of law in favor of Defendant Officer Rogge.

STANDARD FOR GRANTING JUDGMENT AS A MATTER Of LAW

In order to succeed on a motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, defendant must meet a heavy burden. Walter v, Holiday Inc., 985 F.2d 1232, 1238 (3d. Cir. 1993) (judgment as a mater of law should be granted sparingly). A motion under Rule 50(b) "'should be granted only if, in viewing the evidence in the light most

favorable to the end giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's versions'" McDaniels v. Flick, 59 F.3d 446, 453 (3d Cr1995), cert. denied. 516 U.S. 1146, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996) (quoting Lightning Lube. Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993) (citations omitted)).

Rule 50(b) provides for post-trial renewal of notions made under Rule 50(a). The standard for deciding the motion is the same whether it is made at trial or afterwards. Smollett v. Skayting Development Corp., 793 F.2d 547, 542 (3d Cir.1986) (citing Neville Chem. Co. v. Union Carbide, 422 F.2d 1205 1210 n5 (3d Cir. 1970). cert. denied. 400 U.S. 826 (1971)). Defendant made a Motion for Judgment as a Matter of Law at the close of Plaintiffs case pursuant to

BACKGROUND

This Section 1983 claim as well as the claims for assault, battery and false imprisonment are the result of Plaintiff being arrested by the Lower Gwynedd Township police for driving while under the influence of alcohol ("DUI") in. violation of Section 3731 of the Pennsylvania Motor Vehicle Code. fn2 The propriety of Plaintiff's arrest is not in dispute. Plaintiff's counsel conceded at trial that the Lower Gwynedd Township police had probable cause to stop Plaintiff's vehicle and to arrest Plaintiff for DUI. Plaintiff does take issue, however, with the manner in which he was treated by the police after his arrest and while he was being held at the Lower Gwynedd Township police station.

The facts as established by the evidence and testimony presented at trial are as follows. At about 9:30 p.m. on September 8, 1997, Corporal Don Boehs of the Lower Gwynedd Police Department was on routine patrol in the Spring House section of the Township when he observed a motor vehicle being operated at a high rate of speed in the center lane of Bethlehem Pike. The vehicle, which was being operated by the Plaintiff, Joseph Istvanik, was traveling in excess of the speed limit when it crossed over two solid yellow lines, and illegally passed an automobile that was traveling in the same direction. Corporal Boehs immediately activated his emergency lights and his siren and started after Plaintiff's vehicle. Notwithstanding the lights and the siren, Plaintiff did not pull over. Corporal Boehs called for back-up and Officer Michael Rogge responded by pulling his vehicle into the intersection of Bethlehem Pike and Norristown Road and activating his emergency lights. When Plaintiff reached Norristown Road, instead of stopping, he made a right turn onto Norristown Road. Officer Rogge and Corporal Boehs followed Plaintiff who ultimately brought his vehicle to a stop a short distance down Norristown Road. The distance between where Corporal Boehs began his pursuit of Plaintiff and where Plaintiff ultimately stopped was approximately one mile. When Plaintiff stopped his vehicle, be immediately got out of his car and started pointing to a sign on the back of the vehicle that read "DOD." As he did this, he told the officers that he was a member of the Department of Defense. fn3 He testified that he said this to the officers in the hope that he would receive "leniency." fn4 When Corporal Boehs approached Plaintiff, he noticed the odor of alcohol. He also noticed that Plaintiff's speech was slurred and he bad an unsteady gait. The officers administered several field sobriety tests to Plaintiff. Plaintiff testified that he thought he had done well on these tests. The police

officers testified that Plaintiff failed the field sobriety tests. The officers also gave Plaintiff a Preliminary Breath Test ("PBT"). This test indicated that Plaintiff's blood alcohol level was 0.16% Under Pennsylvania law, a person with a blood alcohol level 0.10% is presumed to be intoxicated to an extent that they are incapable of safe driving. As a result of the police observations of Plaintiff and his driving, the results of the field sobriety tests and the results of the PBT, Plaintiff was arrested for DUI.

Plaintiff was handcuffed, placed in the back of a patrol car and taken to the Lower Gwynedd Township police station. From there, Corporal Boehs and Officer Rogge took Plaintiff to North Penn Hospital for a blood-alcohol test After being fully advised of the implied consent law, Plaintiff refused to submit to the test. fn5 Once again, Officer Rogge handcuffed Plaintiff and put him in the patrol car, this time taking him to the Montgomery Township Police Department Due to a manpower shortage at the Lower Gwynedd Police Department, Lower Gwynedd prisoners are often housed in Montgomery Township's holding cells. Once at the Montgomery Township Police Department, the officers asked Plaintiff to make a telephone call to friends or family to come and pick him up. fn6 After attempting to call. Plaintiff advised the officers that be was unable to contact anyone on the telephone, indicating that nobody was home at his residence. Because there was no responsible adult available to take care of Plaintiff and because the officers did not want to simply release Plaintiff in his intoxicated stat; they decided that for Plaintiff's own safety, they should leave him at the Montgomery Township facility until the alcohol wore off. Under the circumstances. Officer Rogge left Plaintiff in the custody of Montgomery Township and because his shift had come to an end, he went home.

At approximately 1:00 a.m. on. September 9, 2000, Officer Rogge was Sled at his home and told to pick up Plaintiff at the Montgomery Township Police Department. The officers at the Montgomery Township Police Department had called the Lower Gwynedd police and had advised them that Plaintiff was being "uncooperative," and that they would not keep him any longer. Evidently, the holding cells at Montgomery Township, like the holding cells at Lower Gwynedd, have surveillance cameras so that the well being of the prisoners can be monitored while they are being held. Although Plaintiff was advised at Montgomery Township that he must stay within the view of the camera, he refused to do so. Plaintiff persisted in going to an area of the holding cell where he could not be seen by the camera. After warning Plaintiff about this several times, the personnel at Montgomery Township grew weary of Plaintiff's refusal to cooperate and called Lower Gwynedd to come get their prisoner. Officer Rogge and Corporal Boehs went to Montgomery Township, picked Plaintiff up (again placing hint in handcuffs), and brought him back to Lower Gwynedd Township's Police Department, where he was placed in their holding cell.

Officers Rogge and Lawn placed Plaintiff in the Lower Gwynedd holding cell, without handcuffs, at approximately 1:32 a.m. Plaintiff began to walk around the holding cell and found an area of the cell where he could not be seen. A few minutes later he was told over the intercom that. he must remain in view or the camera that was mounted in the corner of the cell. He was told that this was for his own safety and was told he was free to move about the cell as he pleased so long as he stayed out of those small areas of the cell where the camera could not see him. Plaintiff admits that he did not comply with this directive. Plaintiff continued to go

to those areas of the cell where he could not be seen. A few minutes later, one of the officers personally went to the holding cell and instructed Plaintiff to stay in view of the camera. Again, Plaintiff did not comply.

It is unclear exactly how many warnings Plaintiff received. In any event, at 1:43 a.m., Officer Rogge came to the holding cell with a set of standard handcuffs. He placed one handcuff around one of Plaintiff's wrists. He then pushed Plaintiff into a sitting position on the floor next to a steel cot (which was in view of the camera) and placed the other cuff around one of the cot's legs. While Officer Rogge applied the handcuffs, Plaintiff informed him that he suffered from multiple disabilities and was concerned that forcing him to stay in a fixed position would cause him pain. Officer Rogge advised Plaintiff that the measure was necessary to keep him in view of the camera for insurance purposes and to ensure his safety while in the holding cell.

Thus restrained, and dearly warned, Plaintiff continued his efforts to evade the camera's eye. Unable to move around the holding cell, Plaintiff crawled under the steel cot and lay on his back. While in this position he was, again, out of the camera's view. fn7 A few minutes later, Officer Rogge re-entered the cell and told Plaintiff that he could not lie under the cot because he could not be seen. Rogge again admonished Plaintiff to stay where he could be seen by the camera and he left the cell. After Rogge left, Plaintiff again climbed under the cot. He testified that he wanted "privacy." Because of Plaintiff's persistent refusal to stay within view of the camera, Officers Rogge and Lawn again entered the call. This time they brought a second set of handcuffs. The two officers pulled Plaintiff out from under the cot and sat him down on the floor in a seated position with his back to the cots They removed the original set of handcuffs

front their previous position and applied a double handcuff configuration. They placed Plaintiff's arms behind his back and applied one cuff from each set around a wrist. They then wrapped both sets around the leg of the cot and joined the two sets behind that leg. Thus restrained, Plaintiff was required to sit on the floor in view of the camera with his hands cuffed behind his back to the cot. While Officers Rogge and Lawn applied these cuffs, Plaintiff again informed them that due to his disabilities, he was in pain. He also complained that the handcuffs were tight.

Plaintiff remained in this position for the next several hours during which he intermittently drifted in and out of sleep. During this time, police officers came to the cell periodically to check on hint. Sometime between 5:30 and. 7:00 an (the exact time is in. dispute). Plaintiff was awakened by Officer Rogge and helped to his feet. He was asked if he wanted anything to eat or drink but be declined. He was permitted to use the telephone but was unsuccessful in contacting anyone. Officer Rogge then drove him to his home and dropped him off Four days later, Plaintiff sought medical treatment for what he characterized as cuts, bruises and swelling of his wrists as well as a nerve problem which he attributed to the handcuffs.

ANALYSIS

I. Standard for Excessive Force Claims

In the instant case, Plaintiff was arrested for DUI, a misdemeanor of the second degree. He was placed in a holding cell at the local police station where he was monitored by the arresting officer. He was asked to call family or friends to come get him because the officers were concerned that in his intoxicated state be could

harm himself if they simply released him from custody. He had not been formally arraigned before a judicial officer, it being the intention of the officers to file a complaint with the issuing authority with a summons to follow. It was while Plaintiff was in this "arrestee" status that his constitutional right to be free from the use of excessive force was allegedly violated. Based on this status, we instructed the jury to apply a Fourth Amendment "objective reasonableness" standard to Plaintiff's excessive force claims. Defendant contends that the court erred in this instruction. Defendant contends that we should have instructed the jury to apply the Fourteenth Amendment "shocks the conscience" or "deliberate indifference" standard. We disagree.

In the case of Graham v. Connor, 490 as. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held that the use of force during an arrest, an investigatory stop or any other "seizure" of a person at liberty is judged by the Fourth Amendment's "objective reasonableness" standard. It the case of Whitley v. Albers, 475 U.S. 312 (1985), that Court held that an excessive force claim brought by a convicted and sentenced prisoner is governed by the Eighth Amendment's cruel and unusual punishment clause. In Bell v. Wolfish, 441 US. 550 (1979), the Supreme Court bald that excessive force claims by a pretrial detainee," a person lawfully committed to pretrial detention who has not been convicted but is awaiting trial after a judicial determination of probable cause, are governed by the Fourteenth Amendment due process clause.

Cases involving the period between arrest and the initial court appearance (before a magistrate or otherwise), lie in what some courts have referred to as a "legal grey zone." See, Estate of Glenn v. Borough of Morrisville,

2000 WL 964746 (E.D.Pa. 2000). The Supreme Court has yet to articulate what constitutional provision applies to claims of excessive force by this class of detainee. In fact, the Court specifically declined to decide "whether the Fourth. Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." Graham, 490 U.S. at 395.

The Second, Eighth, Ninth and Tenth Circuits have applied Fourth Amendment standards to this period of time between arrest and the initial court appearance. In doing so, reference has been made to the "continuing seizure doctrine" in which a Fourth Amendment "seizure" is said to last for some period of time beyond the actual physical arrest. See Wilson v Spain, 209 R3d 713(8th Cit. 2000); Pierce v. Multnomah County, 76 F.3d 1032 (9th Cir. 1994) (holding that "the Fourth Amendment sets the applicable constitutional limitation on the treatment of an arrestee detained without a warrant up until the time each arrestee is released or found to be legally in custody based upon probable cause for arrest."); Austin v. Hamilton, 945 F.2d 1155. 1160 (10th Cir. 1991) (overruled on other grounds) (holding that the Fourth Amendment's protections "also persist to impose restrictions on the treatment of the arrestee detained without a warrant," and concluding that the Fourth Amendment should continue to apply in these cases at least until the time of arraignment."); Powell v. Gardner. 891 F.2d 1039, 1043-4 (2d Cir. 1989) (noting that "the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person. arrested is arraigned, or formally charged, and remains in the custody . . . of the arresting officer.").

Other circuits have rejected the Fourth Amendment

"objective reasonableness" standard in favor of a Fourteenth Amendment due process the conscience" or "deliberate indifference" standard. These courts suggest that the Fourth Amendment focuses on the initial deprivation of liberty (e.g., what constitutes probable cause to arrest) and not the conditions of continent after that deprivation See Riley v. Dorton, 115 F.3d 1159(4th Cir. 1997); Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994); Titran v. Ackman, 893 F.2d 145 (7th Cr. 1990).

The Supreme Court has recognized that after a warrantless arrest, the Fourth Amendment contemplates a certain period of pre-arraignment detention before the arrestee can receive the full Fourth Amendment protection in the form of a prompt determination of probable cause by a neutral judicial officer. Riverside v. McLaughlin, 504) U.S. 44 (1991); Gerstein v. Pugh, 420 U.S. 103 (1975). During this time, obviously the defendant is not a pretrial detainee, in fact, he may never become a pretrial detainee. He is in the truest sense subject to "continuing seizure" under the Fourth Amendment. He is simply awaiting a determination of whether his seizure status will unfortunately blossom into the status of a pretrial detainee. Usually, as here, that wait is in a holding cell at the municipal police station rather than in the hands of corrections officers at a county jail. Usually, as here, the arrestee remains in the custody of the arresting officer or other local police personnel while awaiting the preliminary arraignment The preliminary arraignment may obviate the necessity for defendant to experience pretrial detainee status. We can see no legal or logical reason why someone in this position should be categorized as a pretrial detainee creating Fourteenth Amendment implication rather than as an arrestee subject to Fourth Amendment seizure constraints.

Defendant argues that the recent Third Circuit case of Fuentes v. Wagner, 206 F.3d 335 (3d Cir. 2000), mandates application of a Fourteenth Amendment due process "shocks the conscience" standard to in this case. Fuentes involved an excessive force claim against a corrections officer at the Bucks County Prison. Fuentes was a convicted prisoner who was awaiting sentencing. His lawsuit arose as a result of the use of force by corrections officers in subduing him in response to a disturbance in his cell and his subsequent confinement in a "restraint chair" for several hours after the incident. The Third Circuit classified Fuentes as a "pretrial detainee" and applied a Fourteenth Amendment due process standard. in reaching this conclusion., the Court observed, that this standard applies in situations such as prison disturbances where the "officer must instantaneously respond to a situation without opportunity for reflection." Fuentes, 206 F.3d at 348.

In the instant case, Plaintiff had not been convicted of a crime and was not awaiting sentence He was not one of many pretrial detainees or convicted or sentenced prisoners at a county prison being supervised by corrections officers. He was, rather, the sole arrestee in a police station holding cell being detained and monitored by one of his arresting officers before a determination of probable cause had been made by a judicial officer. And, he was being detained only because he was intoxicated and the police were concerned for his safety we reject Plaintiff's suggestion that Fuentes is controlling under these circumstances.

Although the Court of Appeals for the Third Circuit has not yet issued a definitive ruling on this subject, we believe that our conclusion is consistent with that Courts discussion of the Fourth Amendment in Torres McLaughlin, 163 F.3d 169 (3d Cir. 1998). Torres dealt

with a claim of malicious prosecution in violation of the First, Fourth, Fifth, and Fourteenth Amendments, after the plaintiff was convicted of unlawful possession of cocaine. His Fourth Amendment claims stemmed from unconstitutional confinement due to an alleged unlawful arrest. In declining to find a Fourth Amendment violation, the court held that the plaintiff's "post-conviction incarceration" was not a "seizure" under the Fourth Amendment.

In making this determination, however, the court reviewed the continuing debate on the extent of Fourth Amendment protections. It noted that "although the Supreme Court has repeatedly defined when a Fourth Amendment seizure occurs or begins, it has not determined when that seizure ends and Fourth Amendment protections no longer apply. We also have left open that question." Torres, 163 F.3d at 174. Significantly, however, the court went on to note that:

it is beyond dispute that the Fourth Amendment has been construed to include events both before and after a formal arrest. . . . Although Fourth Amendment seizure principles may in some circumstances have implications in the period between arrest and trial . . . . post-trial incarceration does not qualify as a Fourth Amendment seizure.

Id. (internal citations omitted) (emphasis added). The court finished its discussions by concluding that "the limits of Fourth Amendment protection relate to the boundary between arrest and pretrial detention." But, quoting United States v. Johnstone, 107 F.3d 200, 206-207 (3d Cir. 1997), the Court noted that "[w]here the seizure ends and pre-trial detention begins is a difficult question.'" Torres, 163 F.3d at 174.

We would suggest that the seizure ends and pretrial detention begins at the preliminary arraignment, when judicial officer determines that probable cause exists and the defendant is held for court. As Judge Brotman observed in Hill v. Algor, 85 F.Supp.2d 391, 403-04 (D.N.J. 2000), "defining pretrial detention as beginning with formal charge or initial presentment serves practical purposes. It creates a bright line, thereby affording the courts and law enforcement with much needed clarity as to the precise constitutional standard governing police conduct."

II. Qualified Immunity

a) Qualified Immunity Standard

Under the doctrine of qualified immunity, "[g]overnmnet officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sharrar v. Feising, 128 F.3d 810, 526 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U. S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)); In re City of Philadelphia Litig., 49 F.3d 945, 961 (3d Cir. 1995). The inquiry when a defendant claims qualified immunity is "whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession." Sharrar, 128 F.3d at 826. Officers who reasonably but mistakenly conclude that their conduct is lawful are entitled to immunity. Id.

Until recently, there has been a conflict among the Circuit Courts of Appeals regarding the application of qualified immunity in a Fourth Amendment excessive force context Noting that both the standard for Fourth

Amendment excessive force set forth in Graham v. Connor, supra, and the standard for qualified immunity enunciated by the Supreme Court focus on the objective reasonableness of the defendant officer's conduct, a majority of circuits bad held that the two analyses collapse into a single objective reasonableness test for a jury to decide. These courts concluded that a finding of excessive force precludes a finding of qualified immunity. See Katz v. U.S., 194 F.3d 962, 968 (9thCir. 1999); Bass v. Robinson, 167 F.3d 1041, 1051(6th Cir.1999); Thomas v Roach, 165 F.3d. 13~7, 143 (2d CirJ999); Frazell v. Flanigan, 102 F.3d 877, ~8d-87(7th Cit 1996); Scott v. District of Columbia, 101 K3d 748, 759 (]D.C.Cir.1996); Mick v. Brewer, 76 F.3d 1127, 1135 n. 5 (10th Cir.1996); Rowland v. Perry, 41 F.3d 167, 173 (4th Cir.1994). At least one circuit concluded that the two tests are subtly distinct and that there is no inherent conflict between a finding of excessive force in violation of the Fourth Amendment and a granting of qualified immunity to the defendant officers. See Synder v. Trepagnier, [42 F.3d 791, 800-01 (5th Cir. 1998).

When the qualified immunity issue was first raised by Defendant in a Rule 50 motion at the conclusion of Plaintiff's case, in the absence of Third Circuit authority on the subject, we opted to collapse the issues and to strait the objective reasonableness determination to the Jury. The jury concluded Rogge used excessive force.

On June 18, 2001, the Supreme Court it Saucier v. Katz 121 S.Ct 2151 (2001), finally resolved this issue by making it clear that the qualified immunity analysis is separate and distinct from the Fourth Amendment excessive force analysis under the Graham "objective Reasonableness"" test.fn8 It is appropriate, therefore, to revisit the issue of qualified immunity in this matter.

In Saucier v. Katz, the Supreme Court overruled those courts that have fused the objective reasonableness analysis under Fourth Amendment excessive force standards with the reasonableness analysis under the doctrine of qualified immunity. The Court held that 'The inquiries for qualified immunity and excessive force remain distinct, even after Graham." Quoting its previous decision in Harlow v. Fitzgerald, 457 U.S. BOO, 102 S-Ct. 2727, 73 LSd.2d 396 (1982), the Court acknowledged that "there was some 'surface appeal' to the argument that, because the Fourth Amendments guarantee was a right to be free from unreasonable searches and seizures, it would be inconsistent to conclude that an officer who acted unreasonably under the constitutional standard nevertheless was entitled to immunity because he 'reasonably acted unreasonably.'1' Saucier, 121 S.Ct. at 2157 Nevertheless, the Court found that this "superficial similarity" cannot overcome the history of or justification for applying qualified immunity to Fourth Amendment claims against police officers. Id.

In arriving at this conclusion, the Court noted that Graham's objective reasonableness standard for Fourth Amendment excessive force violations focuses on a judgment of the reasonableness of an officer's use of force with deference to the judgment of reasonable officers on the scene. "The qualified immunity inquiry . . . has a further dimension." The Court explained:

The concert of immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a

mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."

Saucier, 121 S.Ct at 2158. The Court further emphasized that despite the seemingly clear standard announced in Graham, that standard "does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts," id., and that "qualified immunity protects '"all but the plainly incompetent or those who knowingly violate the law." at 2157 (quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

In addition to noting that the Fourth Amendment and qualified immunity tests are distinct, the Court in Saucier also discussed the proper methodology to be applied by the lower courts in a qualified immunity analysis This methodology consists of a two-part inquiry. The first step is to analyze the threshold question of whether the facts alleged, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right. Saucier, 121 S.Ct. at 2156. This question has already been answered in the affirmative in this case by the jury's finding that Officer Rogge's actions constituted excessive force in violation of Plaintiff's a Fourth Amendment rights.

Where a violation of a plaintiff's constitutional rights could be (or in this case has been) made out on a favorable view of the parties' submissions, the next step in the inquiry is to determine whether that right was clearly established. The Court emphasized that this inquiry "must be undertaken in light of the specific

context of the case, not as a broad general proposition." at 2156. While Graham's "objective reasonableness" standard for Fourth Amendment excessive force is well-known, the Court noted that the "right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" (citing Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). This question, Saucier teaches, is not answered-by a plaintiff's verdict under the Graham standard in a Fourth Amendment excessive force case.

In light of the above, it is clear that despite the finding of the jury that Officer Rogge's actions violated the Graham standard for excessive force and constituted a violation of Plaintiff's Fourth Amendment rights,fn9 we must now engage in a separate analysis to determine whether, in light of the particular circumstances in this case, that right was clearly established. In doing so, we must be mindful that for Plaintiff's violated rights to he clearly established, Officer Rogge's actions must have been such that a reasonable officer would have known that his conduct violated Plaintiff's rights. For the reasons set forth below, we are compelled to conclude that Officer Rogge's actions did not violate clearly established constitutional rights. We are satisfied that reasonable officers in Officer Rogge's position could have reasonably believed that Rogge's conduct was lawful.

b) Officer Rogge's Conduct

In his closing argument counsel for the Plaintiff emphasized that the "heart and soul" of Plaintiff's

excessive force claim was the claim that the handcuffs that the officers applied to Plaintiff were too tight when plaintiff was double-cuffed to the steel cot. Plaintiff presented evidence that his wrists were swollen and bore deep bruises for several days after he was released from the Lower Gwynedd Police Department. Four days after his release he sought medical attention. He also presented testimony that he now suffers from numbness and a partial loss of function in his right hand as well as a condition known as reflex sympathetic dystrophy (a condition which causes chronic, progressive pain). Plaintiff testified that whet the officers initially applied the double-handcuffs, he told them that they were "tight." He also testified that he experienced pain in his wrists from the tightness of the handcuffs as he drifted in and cut of sleep over the course of the evening.

Assuming that the handcuffs were, in fact, too tight, that this caused Plaintiff injuries and that this constituted excessive force in violation of the Fourth Amendment, the question that we must answer is whether this Fourth Amendment right was clearly established. As per the Supreme Courts instructions in Saucier, this inquiry must be undertaken in light of the specific context of this case. Again, we are guided by the principle announced in Malley v. Briggs, that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."

As discussed above, when Officer Rogge first applied the double handcuffs, Plaintiff complained that they were "tight." However, Plaintiff admits that the police looked in on him from time to time during his confinement He did not testify that he made any further specific mention of pain in his wrists or requested that the police loosen the handcuffs. There is uncontraverted testimony that Officer Lawn performed a "finger test"

check for handcuff tightness.fn10 In addition, Plaintiff's own expert conceded that the double-handcuff technique, as opposed to a single set of handcuffs, is used in order to provide a greater measure of comfort to a prisoner.

An examination of federal case law regarding tight handcuffing as a violation of Fourth Amendment protections against excessive force reveals that the law in this area is not clearly established even on a general level. Some circuits have concluded that tight handcuffing is a potential basis for an excessive force claim. See, e.g., LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000) (citing Hansen v. Black, 885 F2d 642 (9th Cir. 1989) (affirming denial of summary judgment due to existence of genuine issue of material fact as to whether officers used excessive force in handcuffing in the course of arrest)); Martin v. Heideman, 106 F.3d 1308, 1312-13 (6th Cir. 1997) (holding that an overly tight application of handcuffs despite protestations of plaintiff can state excessive force claim).fn11 Other circuits have taken a contrary view, See Glenn v. City of Tyler, 242 F.3d 307 (5th Cir. 2001) (holding that handcuffing too tightly, without more, does not constitute excessive force);fn12 Hannula v. City of Lakewood, 907 F2d 129. 132 (10th Cit. 3990) ("while loosening tight handcuffs may be the most compassionate action, the failure to do so does not rise to a. clearly established constitutional violation.").

Between these two extremes lie a handful of conflicting cases. See, e.g., Greiner v. City of Champlin, 27 F.3d 1346 *8th Cir. 1994) (affirming grant of qualified immunity to police officers where handcuffs applied so tightly as to cause cuts in the plaintiff's wrists and defendants refused plaintiff's request to loosen them and citing the fact that plaintiff's were abusive and

intoxicated); Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993) (affirming denial of qualified immunity where handcuffs applied tightly, and defendant police officer refused plaintiff's request to loosen then); Hoffa v. Township of Colebrookdale, 1999 WL 55171 E.D.Pa Jan. 15 1999) granting qualified immunity where tight handcuffs caused pain and discoloration in plaintiff's a hands); McPherson v Auger, 842 F.Supp. 25 (D.Me. 1994) (denying qualified immunity where handcuffs applied tightly and defendants ignored plaintiff's cries of pain); Cooper v. City of Virginia Beach, 817 F.Supp. 13 10 (E.D.Va. 1993) (granting qualified immunity to defendant police officers for tight handcuffing where injuries sustained by plaintiff were limited to bruising and welting) (citing Darnell v. Phi Phillips, 914 E2d 247 (Table) (4th Cir. 1990).

From a review of this case law, it is clear that tight handcuffing is a perfect example of the Supreme Courts warning in Saucier v. Katz that "Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." Saucier, 121 S.Ct. at 2158. The doctrine of qualified immunity exists to protect law enforcement officials from exactly the type of muddied legal waters apparent in the case law concerning use of tight handcuffs.

It is also clear that the less serious the injuries resulting from tight handcuffs, the more likely it is that a court will grant qualified immunity. In the instant case, Plaintiff claimed to have suffered permanent injury to his arm and hand, loss of function in his hand and permanent chronic pain. Significantly, the jury awarded Plaintiff only $55,000.00 in compensation for all of these alleged injuries and refused to award punitive damages. When one compares the damage award to the injuries

that Plaintiff was alleging, one is compelled to ask the question "What exactly was the jury compensating?"

Finally, where plaintiffs are intoxicated, pose a threat to themselves or others, resist arrest or are abusive to the police, the courts are more likely to grant qualified immunity. The undisputed facts of the case make clear that the police were dealing with an uncooperative drunken driver, Plaintiff's counsel stipulated that the police had probable cause to arrest Plaintiff for driving while intoxicated. The way Plaintiff was driving, the results of a field sobriety test, and a 0.16 percent reading recorded on a Preliminary Breath Test administered at the scene left little doubt about Plaintiff's condition. In addition, Plaintiff admitted that he had been drinking earlier in the day. Plaintiff was taken to the hospital for a blood-alcohol test which be refused with full knowledge that he would lose his drivers license for a year. At trial, Plaintiff claimed that he refused the blood test because he was afraid of needles. Plaintiff also testified that he undergoes liver scans every 90 days that involve needle injections. Police then attempted to contact someone who could take responsibility for Plaintiff. The police were concerned, both for insurance reasons and for Plaintiffs safety, that they could not simply release Plaintiff in an intoxicated state in the middle of the night with nobody home at his residence. They therefore took the sensible step of keeping him in a holding cell (first in Montgomery Township and then in Lower Gwynedd Township) until the alcohol wore off or until a responsible person could pick him up.

The lawsuits against police officers and municipalities where intoxicated defendants have harmed themselves while in custody in police holding cells are legion. The police have a duty to see to the safety of prisoners in a detention cell. Our courts have made it clear that where

the police know that a detainee is particularly susceptible to causing himself injury, the police may be held liable if they act with reckless indifference to that susceptibility. See. e.g., Estelle v. Gamble, U.s. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (holding that prison officials violate the Eighth Amendment's proscription of cruel and unusual punishment when they exhibit deliberate indifference to serious medical needs of prisoners."); Colburn v. Upper Darbv Tp., 946 F.2d 1017 (3d Cit. 1991) (noting that "if [custodial] officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.").

In the instant case, the officers' experience bad taught them that intoxicated detainees are particularly susceptible to vomiting which can lead to asphyxiation. Given the fact that Officer Rogge was aware of Plaintiff's intoxication, we are quite confident that had Plaintiff somehow injured himself because Officer Rogge held him in the cell without visual supervision, Officer Rogge and the municipality would be facing a lawsuit of a different nature. Moreover, if Officer Rogge had simply released Plaintiff from custody in his intoxicated state and he bad injured himself or someone else, the same would certainly be true.

The holding cells at Montgomery Township and Lower Gwynedd Township have cameras that cover ninety-nine percent of the cell. One percent of the cell cannot be seen by the camera. Plaintiff would not stay in view of the camera. Plaintiff insisted on hiding in those areas of the holding cells where he knew he could net be seen. Montgomery Township sent him back to Lower Gwynedd because of this behavior. Lower Gwynedd officers warned him at least twice, if not three times, to

stay in view of the camera. He was permitted to walk around sit or lie on the cot, and otherwise move about the cell, so long as he stayed within view of the camera. When he refused to do so, Officers Rogge and Lawn forced Plaintiff to sit on the floor and handcuffed him by one wrist to the cot. Plaintiff offered no testimony that the officers pushing him to the floor caused any injury. Certainly not every push or shove by a law enforcement officer constitutes a violation of the Fourth Amendment. Graham, 490 U.S. at 396-97. Moreover, the jury concluded that Plaintiff had not been the victim of an assault or battery.

Even handcuffing him to the cot, however, was not enough to keep Plaintiff in view of the camera. He proceeded to hide under the cot. Plaintiff testified at trial that he did this, in part because be felt he might vomit, This is exactly the type of concern that justified Officers Rogge's and Lawn's insistence that Plaintiff stay in view of the camera. It is undisputed that while Plaintiff was 'under the cot, the police could not see him. Officers Rogge and Lawn therefore removed Plaintiff from his hiding place under the cot and sat him next to it. Because Plaintiff had demonstrated that he would hide from the camera if the police gave him the opportunity, the police restrained him in a way that left him no such opportunity. This involved double-cuffing his hands around the leg of the steel cot, forcing him to sit on the floor. We believe that Officer Rogge and the other officers exercised measured restraint in dealing with Plaintiff on this night.

Plaintiff argues that the Defendant officers had other, less restrictive means of restraint available to them. For instance, Plaintiff elicited testimony that Officers Rogge and Lawn could have used a leg shackle to achieve the desired restraining effect. Police need not use the least

force possible in order to avoid violating a detainee's Fourth Amendment rights. Even more persuasive, however, is the fact that real concerns exist for the safety of an intoxicated detainee in a leg shackle. As Police Chief Bright testified leg shackles are not favored for intoxicated detainees who are already susceptible to stumbling. This is simply common sense.

The circumstances under which Officer Rogge was operating on the night in question are really not in dispute. Plaintiff was a very difficult and uncooperative prisoner. Although he may have been in discomfort, he was only in discomfort because of his persistent refusal to comply with the officers' instructions. There is nothing in Plaintiff's testimony from which this Court can conclude that Plaintiff was repeatedly complaining of pain and Officer Rogge callously ignored these complaints. Although Plaintiff testified that he was in "excruciating" pain, there is nothing in the record to indicate that he conveyed this to the officers who came to his cell periodically to check on him. The record does reflect that on one occasion , Plaintiff indicated that he looked into the camera and pleaded that he had had enough, that he wanted to be released, that he wanted the handcuffs removed and that he wanted to walk around, stretch and use the bathroom. Accepting this as true, the record does not indicate when it occurred or whether Officer Rogge even heard it.

Although the jury concluded that Officer Rogge's conduct violated Plaintiffs Fourth Amendment rights, we are not prepared to conclude that Officer Rogge's decision to double-cuff Plaintiff in a sitting position on the concrete floor until his release violated clearly established constitutional rights. Palshook v. Jarrett, 120 F.Supp.2d 641, 655 (N.D.Ohio 2000) (granting qualified immunity to defendant police officers who handcuffed

both of plaintiff's hands to a bench in a holding cell) (cited with approval in Neague v. Cynkar, 2001 WL 83 0437, at #3 (6th Cir. July 25, 2001). To conclude that Officer Rogge was plainly incompetent or that he knowingly violated the law is simply not justified in the totality of this case. Under Saucier, Officer Rogge is entitled to qualified immunity. We therefore grant Defendant Officer Rogge's Request for Judgment as a Mater of Law pursuant to Federal Rule of Civil Procedure 50(b).

An appropriate Order follows.

Footnotes

fn1 In light of our decision on these issues, we need not address the remaining grounds asserted in Defendant's Motion for Post Trial Relief.

fn2 Section. 3731 of the Pennsylvania Motor Vehicle Code provides in pertinent part:

(a) Offense Defined– A person shall not drive, operate or be in
actual physical control of the movement of any vehicle:

(1) while under the influence of alcohol to a degree which renders the person incapable of safe driving:. . .

(4) while the amount of alcohol by weight in the blood of the person is 0.10 % or greater;. . .

75 Pa C.S.A. § 3731.

fn3 Plaintiff's Employment with the Department of Defense had actually terminated in 1989.

fn4 In Order to get the full flavor of what transpired between Plaintiff and the police on the night of September 8th and the early morning hours of September 9th, it is necessary to read the complete transcript of Plaintiff's testimony both direct and cross.

fn5 Section 1547 of the Pennsylvania Motor Vehicle Code provides in pertinent part, as follows:

(b) Suspension for refusal.

(1) If any person placed under arrest for violation of section 3731 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months,

(2) It shall be the duty of the police officer to inform the person that the persons' operating privilege will be suspended upon refusal to submit to chemical testing

(c) Refusal admissible in evidence. – In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3731 . . . the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal.

75 Pa. C,SA. §1347

fn6 Pennsylvania Rule of Criminal Procedure 102 provides, in pertinent parts as follows:

(b) When the arresting officer deems it appropriate, the officer may promptly release from custody a

defendant who has been arrested without a warrant, rather than taking the defendant before the issuing authority, when the following conditions have been met:

(1) the most serious offense charged is a misdemeanor of the second degree; . . .

(3) the defendant poses no threat of immediate physical harm to any other person or to himself...
Pa.R.Crim.P.102 102 (renumbered Rule 441 and amended March 1, 2000, effective April 1, 2001).

fn7 Plaintiff gives several reasons for climbing under the cot: (1) the lights in the cell gave him a migraine headache; (2) lying flat on the floor makes his back feel better; and (3) if he vomited or went to the bathroom, he would have privacy.

fn8 The Supreme Court granted certiorari in Saucier v. Katz on November 13, 2000 and heard argument on March 20, 2001. This opinion was delayed in anticipation of the Court's decision.

fn9 After considering all of the evidence and testimony in this matter, we can identify with the court's observation in Willingham v. Loughman, No. 99-4005, 2001 WL 920676 (11th Cir. Aug. 15, 2001), what indicated that it accepted the jury's finding of the unreasonableness of the officers conduct "with reluctance and doubt."

fn 10 Plaintiff claimed that Officer Lawn performed the test incorrectly.

fn11 It should be noted, however, that both of these decisions pre-date the Supreme Court's decision in

Saucier v. Katz, and come from circuits that subscribed to the theory that the Grahams objective reasonableness standard for Fourth Amendment excessive force claims and the reasonableness standard for qualified immunity fused into one uniform reasonableness inquiry.

fn12 In Glenn, the Court of Appeals for the Fifth Circuit focused on the presence or absence of malice as the determining factor in qualified immunity analysis in an excessive force context. Because the Glenn court found no malice on the part of the defendant police officers, it found that qualified immunity was appropriate. We note that in the instant case, the jury was instructed that if they found that Officer Rogge's actions were "deliberate, willful, wanton, made in reckless disregard or indifference to plaintiff's a rights, you may award punitive damages." The jury did not award any punitive damages.

CIVIL ACTION NO. 98 CV 4029

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH F. ISTVANIK

v.

OFFICER MICHAEL ROGGE

ORDER

AND NOW, this 23rd day of August, 2001, upon consideration of the Post Trial Motions of Defend ant Michael Rogge and Plaintiff's Response thereto and Plaintiff's Motion to Dismiss Defendant's Post Trial Motion and Defendant's Response thereto, it is ORDERED as follows:

1. Defendants Motion for Post Trial Relief is GRANTED and judgment as a matter of law is entered in favor of Defendant, Officer Michael Rogge and against Plaintiff, Joseph F. Istvanik, pursuant to Fed.R.Civ.P. 50(b).

2. Plaintiffs Motion To Dismiss Defendant's Post Trial Motion is DENIED. And It Is So Ordered.

BY THE COURT

R. Barclay Surrick, Judge

No: 01-3395, No: 01-3536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH F. ISTVANIK; ELAINE J. PASSALACQUA, H/W,

v.

MICHAEL ROGGE, Officer; JOHN DOE, Officer; KENNETH BRIGHT, Police Chief; LARRY COMMUNALE, Township Manager; LOWER GWYNEDD TOWNSHIP; RICHARD LAWN, Officer; Joseph F. Istvanik, Appellant.

JOSEPH F. ISTVANIK; ELAINE J. PASSALACQUA, H/W v. MICHAEL ROGGE; KENNETH BRIGHT, Police Chief; LARRY COMMUNALE, Township Manager; LOWER GWYNEDD TWP; RICHARD LAWN, Officer; Michael Rogge, Appellant

Appeals from the United States District Court for the Eastern District of Pennsylvania
(Civil No 98-CV-4029)
District Court: Hon. R. Barclay Surrick

Submitted Pursuant to Third Circuit LAR 34.1(a)

September 20, 2002

Before: SCIRICA, AUTO and McKEE, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third

Circuit LAR 34.1(a) on September 20, 2002.

On consideration whereof, it is now here ORDERED AND ADJUDGED that the judgment of the said District Court entered on August 23, 2001, be and the same is hereby affirmed. In addition, because the judgment entered on August 23, 2001 is affirmed, the appeal of Officer Michael Rogge is dismissed as moot.

Costs taxed against appellant Joseph F. Istvanik in No. 01-3395. All of the above in accordance with the opinion of This Court.

Dated: October 28, 2002

Certified as a true copy and issued in lieu
of a formal mandate on 12/31/02.

ATTEST:
/s/
Clerk
Teste:
/s/
Chief Deputy Clerk,
U.S. Court of Appeals for the Third Circuit.

No: 01-3395, No: 01-3536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH F. ISTVANIK; ELAINE J. PASSALACQUA, H/W,

v.

MICHAEL ROGGE, Officer; JOHN DOE, Officer; KENNETH BRIGHT, Police Chief; LARRY COMMUNALE, Township Manager; LOWER GWYNEDD TOWNSHIP; RICHARD LAWN, Officer; Joseph F. Istvanik, Appellant.

JOSEPH F. ISTVANIK; ELAINE J. PASSALACQUA, H/W v. MICHAEL ROGGE; KENNETH BRIGHT, Police Chief; LARRY COMMUNALE, Township Manager; LOWER GWYNEDD TWP; RICHARD LAWN, Officer; Michael Rogge, Appellant

SUR PETITION FOR REHEARING EN BANC

BEFORE: BECKER, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL BARRY, AMBRO, FUENTES & SMITH Circuit Judges

The petition for rehearing filed by the Appellant-Cross-Appellee Joseph Istvanik in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc, is hereby DENIED.

IT IS SO ORDERED.

By the Court,
/s/
Hon. Theodore A. McKee Circuit Judge

DATED: December 23, 2002
RB/CC: AED; TBH; WFK

No. 02-1480

(2)

Supreme Court, U.S.
FILED
MAY 8 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

JOSEPH F. ISTVANIK,

Petitioner,

v.

OFFICER MICHAEL ROGGE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

This case presents an application of this Court's two-pronged qualified immunity test detailed in Saucier v. Katz, 533 U.S. 191, 121 S. Ct. 2151 (2001), which states, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals." Saucier, at 200.

The three questions presented by the petitioner encompass two issues:

1) Whether the district court and Court of Appeals committed an error of law by finding and affirming, respectively, that the respondent was entitled to qualified immunity regarding the plaintiff's claim under 42 U.S.C. § 1983, because the law establishing the asserted right was not clearly established, even on a general level.

2) Whether this Court need address whether and to what extent a circuit court should consider decisions from other circuits in deciding whether a particular right is "clearly established."

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I. FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

The plaintiff filed a civil action under 42 U.S.C. § 1983, based upon events that occurred after being stopped for drunk driving. (App. at 1, 3) On September 8, 1997, the plaintiff was in Lower Gwynedd Township, Pennsylvania. He was driving erratically, down the center of the road in the turning lane at a high rate of speed, while being pursued by police officers who had their lights and sirens activated. (Boehs testimony at 18-22.) The plaintiff repeatedly ignored attempts to pull him over, and the officers were finally forced to box him in with their vehicles in order to get him to stop. (10/10/00, at 6-8.) The plaintiff leapt from his car, pointed to his Department of Defense parking sticker, and repeatedly shouted "I'm D.O.D., I'm D.O.D." (Boehs testimony at 23.) The plaintiff testified that he hoped that the sticker would gain him some leniency from the officers. (10/5/00 at 17.)

The plaintiff displayed clear signs of intoxication. He had slurred speech, wavering gait, and a strong odor of alcohol on his breath. (Id.) The plaintiff failed the field sobriety test, his preliminary breath test revealing a blood alcohol level of 0.16-well above the legal limit of 0.10. (Id., at 8-9) He himself conceded that the officers has probable cause to arrest the plaintiff on charges of driving while intoxicated.

After refusing to give consent to a blood-alcohol test at North Penn Hospital, the plaintiff was taken to Montgomery Township Police Department to be held until his intoxication abated. (Id., at 10-12.) The plaintiff was detained at the Montgomery Township Department because the police were unable to contact someone to pick up the plaintiff, and Lower Gwynedd cannot hold someone in their

holding facilities without also putting an additional officer on duty. Montgomery Township can accommodate an extra detainee. (Id., at 12-13.)

The plaintiff's bizarre and uncooperative behavior continued during the three hours he was held at the Montgomery Township facility. He took his shirt off and tied it around the bars of the cell, which the officers had to retrieve. (10/6/00 at 46.) He paced repeatedly in his cell, like "a large cat in a cage pacing back and forth, nervous, uneasy..." (Id., at 46.) He repeatedly attempted to evade the surveillance on the cell by moving to areas of the cell which the cameras did not cover. (Id., at 45-48.) After repeatedly ignoring the requests by Montgomery Township officials that he cooperate, the Lower Gwynedd police were asked to retake custody of him. (Id., at 47.)

Back at the Lower Gwynedd station, the plaintiff continued his uncooperative behavior. The plaintiff took his shirt off and covered the camera with it. (10/10/00 at 20; 75-76.) He hid from the camera and banged his head against the door to the cell:

> Q: Now, you heard a banging. What did you do when you hear that banging?
>
> A: Returned back to the cell area...I observed through the window again, I could see Mr. Istvanik banging his head methodically on the door right below the window...he was just leaning against the door banging it.

(Id., 77.) The plaintiff was told that he had to remain within the view of the camera, but repeatedly ignored that warning.

Because of the danger which the plaintiff presented to himself, one of his hands was handcuffed to the leg of the bunk in his cell. This was done in order to keep him a position where he could be observed, so that he did not harm himself. (10/10/00 at 23-24.)

> Q: It's noted on the log that at 1:43 there's a decision made to use one cuff to restrain him. Why is that?
>
> A: [W]e knew we had to confine him to an area where we could see him and where we believed he couldn't do any harm to himself as far as banging himself anymore.
>
> Q: Did he ever say he had to use the bathroom at any time?
>
> A: No, he did not.
>
> Q: Could he have used the bathroom if he had asked?
>
> A: If he had asked, I would have unhandcuffed him and he could have gone to use the bathroom. And he probably would have been given another opportunity to lay on the bed and go to sleep.

(Id., at 23.) Instead of simply sitting and letting the effects of the alcohol wear off, the plaintiff decided to crawl under the bunk, out of range of the camera. (Id., at 24-25.) He was again warned by Officer Rogge to remain visible by the

camera and was specifically told that he could not lie under the bunk. After Officer Rogge left the cell, the plaintiff went under the bunk yet again. He began to repeatedly bang his head against the underside of the bunk. (Id.)

Officer Rogge and another officer, Officer Richard Lawn, reentered the cell and extracted the plaintiff from the underside of the cot. (Id., at 26.) He was seated with his back to the cot and "double cuffed" to the cot leg. (Id.) This is a procedure where two sets of handcuffs are used, one set attached to each wrist with the two sets then attached together behind the cot leg. This gives the prisoner twice as much room to move as would be the case if only one set of cuffs were used. (Id.)

The plaintiff instituted suit against Officer Rogge, Officer Lawn, as well as Lower Gwynedd Township, its police chief and its township manager. The plaintiff claimed that this handcuffing was done in such a manner and to such an extent that is constituted excessive force.

The defendant filed a motion to dismiss under Rule 12(b)(6), arguing that he was entitled to qualified immunity, and therefore, had the right not to stand trial and be free from the other burdens of litigation. This motion was denied. (App., at 4).

Trial was held before the Honorable R. Barclay Surrick and a jury, and the jury returned a verdict in favor of the plaintiff in the amount of $55,000.00. (App., at 9) Only Officer Rogge was found to be liable. In the Defendant's

post-trial motion under Rule 50(b), he asserted, inter alia, that the trial court erred in not granting him qualified immunity.[1]

The Court held that qualified immunity should have been granted, following the then-recent decision of this Court in Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001). (App., at 26-38)

The district court presumed that the facts alleged by the plaintiff could amount to a violation of a constitutional right, because the jury found for the plaintiff. However, the Court also concluded that the right to be free of overly-tight handcuffs was not so well-established that a reasonable officer in Officer Rogge's position would have known his conduct was unlawful. (App., at 30-37.) As such, he was entitled to qualified immunity. The district court thus granted the Rule 50(b) motion. (App., at 38.)

The plaintiff appealed to the Third Circuit Court of Appeals at 01-3395, asserting, inter alia, that the district court's analysis under Saucier was improperly done[2]. The

---

[1] One of the arguments which was not addressed by Judge Surrick was whether or not the verdict against Officer Rogge for the excessive use of force was against the weight of the evidence. The excessive force claim was based exclusively on the argument that the cuffs were too tight, but the evidence at trial clearly showed that the cuffs were put on the plaintiff by co-defendant Officer Richard Lawn, not by Officer Rogge. The jury found in favor of Officer Lawn and the plaintiff did not appeal that finding.

[2] Officer Rogge also filed a protective appeal at 01-3536, arguing that if the Court found the district court's decision on qualified immunity issue in favor of the plaintiff, that the Court erred in not

Court of Appeals reviewed the district court's opinion, and concluded, "[w]e find no error in the district court's Saucier analysis."(App., at 6a)

Since there was no merit to any of the issues raised by the plaintiff, the Court affirmed "the district court's grant of judgment as a matter law to Rogge."(App., at 9a.) The petition to this Court for a writ of certiorari followed.

II. ARGUMENT AGAINST ISSUING THE WRIT OF CERTIORARI

A. The Considerations Preferred By This Court When Granting Certiorari Are Not Present Here

Rule 10 of the Supreme Court Rules details the reasons which this Court considers compelling when determining whether to exercise its prerogative and issue a writ of certiorari. Those reasons include when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(a), (c).

None of the considerations of Rule 10 are present in this petition for a writ of certiorari. The plaintiff's claim is, at heart, a request for this Court act as an error correcting court, and to review what the plaintiff sees as the

---

using the more generous "shock the conscience" standard of the Fourteenth Amendment.

misapplication of the two-part qualified-immunity test established in Saucier[3]. The plaintiff also asks this Court to resolve the split among the circuit courts as to when and to what extent case law from other circuits can be used to find that the law has been "clearly established." Neither of these reasons is an appropriate basis for granting the petition for the writ of certiorari.

Regarding the first issue, Rule 10 notes that this Court is loathe to grant certiorari simply to address what the petitioner perceives as an improper application of a properly stated rule. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. The opinion by Judge McKee of the Third Circuit Court of Appeals shows that the court appropriately applied of the proper rule of law regarding qualified immunity.

As for the second issue, this Court should not issue a writ of certiorari because there is a split among the circuits regarding the use of case law from outside the circuit in determining whether a particular point of law was "clearly established." The conflict that exists has no relevance to this case. Both the district court and Court of Appeals examined the law in the broadest possible terms, examining both district court and court of appeals cases from other circuits in determining that the right has not been "clearly established."

---

[3] Both question 1 and 2 of the "Questions Presented" by the plaintiff appear to address the same issue; one asking whether the right was clearly established, the other asking whether the Court of Appeals erred in finding that it was not.

Had these courts used a more narrow standard, qualified immunity would still have been appropriate.

As such, if this Court were to find the issue of how broadly the law should be canvassed to be a question worthy of eventual review by this Court, it is respectfully suggested that certiorari be withheld until such time as the inquiry would be determinative. The circuits may be split on their approach to this issue, but Officer Rogge is entitled to qualified immunity regardless of which approach is used. Examining the issue in this case would merely be an academic exercise, and the defendant respectfully suggests that if this Court is to address this issue, it should do so where this Court's analysis has a substantive, if not determinative, effect on the case.

As such, the petition for writ of certiorari should be denied.

B. The Trial Court Properly Applied the Supreme Court's *Saucier* Decision, and Found That Officer Rogge Was Entitled to Qualified Immunity.

The lower courts correctly held that Officer Rogge was entitled to qualified immunity. Government officials exercising discretionary functions have qualified immunity from suits seeking damages under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed. 2d 396, 102 S. Ct. 2727 (1982).

If the law does not put the officer on notice that his actions would be clearly unlawful, qualified immunity must be

granted. Saucier, 533 U.S. at 202. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 271, 106 S. Ct. 1092 (1986).

Applying *Saucier*

The Court of Appeals and the district court before it, assumed that the first step in the Saucier analysis was foreclosed by the fact that the jury found for the plaintiff. The plaintiff's argument for denying Officer Rogge qualified immunity-based on the claim of excessively tight handcuffs while the plaintiff was double-cuffed to the cell bunk-fails to account for the fact that Officer Rogge did not actually put the handcuffs on the plaintiff.[4]

---

[4] While Officer Rogge could not recall who handcuffed the plaintiff, Officer Lawn and the plaintiff himself testified that it was Officer Lawn who put the cuffs on the plaintiff.
(10/10/00 at 33; 81.)

Q: Mr. Istvanik, when Officer Lawn applied the cuffs to your right wrist, can you describe how he applied the handcuff?

A: The only thing that I can describe, he takes them, he squeezes them of my left wrist. I could hear them clicking, click, click, click, click, click. And he squeezed them on the right wrist. And I told him, I said, "These are tough, these are tight," and they left.

(10/5/00 at 38-39.) Officer Lawn testified, however, that the plaintiff did not state that the cuffs were tight. (Id. at 83.)

It belies logic to suggest that the jury's verdict can foreclose the question of whether Officer Rogge can be found to have used excessive force in using tight handcuffs when it was Officer Lawn who actually put them on. Nevertheless, even if it is assumed for the sake of argument that a constitutional right would have been violated on the facts, qualified immunity was still appropriate, because there was no clearly established right.

There Was No Clearly Established Right

The second step of the Saucier test asks whether the right in question was clearly established. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." Saucier, at 201.

It is not enough that the right alleged to be violated was established as a general proposition. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." Saucier, at 202, quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987).

The analysis of whether the right was clearly established must be done from the perspective of the officer on the scene. Graham v. Conner, 490 U.S. 386, 396, 109 S.Ct. 1865 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. "With respect to a claim of excessive force,

the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers'...violates the Fourth Amendment." Id., internal citation omitted.

The Third Circuit Court of Appeals has described the second prong of the Saucier test as asking, "in the factual scenario established by the plaintiff, would a reasonable officer have understood that his actions were prohibited? The focus in this step is solely upon the law. If it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity." Bennett v. Murphy, 274 F.3d 133, 136-137 (3d Cir. 2001).

Thus, under the particular facts of this case, Judge Surrick in the district court and the Court of Appeals in review had to decide whether a reasonable officer would have understood that double-cuffing an intoxicated and uncooperative prisoner to the leg of his cot, so as to prevent him from evading the view of the cell camera, harming himself, and possibly aspirating on his own vomit, after attempting other, less forceful methods of achieving these goals, was prohibited.

Examining the state of the law at the time of the plaintiff's arrest, it is apparent that there was no settled law in this area, as Judge Surrick surmised. Whereas the right must be defined at the appropriate level of specificity, the district court noted "that the law in this area is not clearly established even on a general level."(Opinion at 20.)

In evaluating this prong, Judge Surrick surveyed court decisions in the Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, and the Eastern District of Pennsylvania, District of Maine, and Eastern District of Virginia. The Court

concluded that some of these decision found excessively tight handcuffs to be supportive of an excessive force claim, some found that it does not, and some were in between.

The Court cited to Glenn v. City of Tyler, 242 F.3d 307 (5th Cir. 2001) for the proposition that "handcuffing too tightly, without more, does not constitute excessive force," and quoted the Tenth Circuit Court of Appeals decision in Hannula v. City of Lakewood, 907 F.2d 129 (10th Cir. 1990) for the proposition that "while loosening tight handcuffs may be the most compassionate action, the failure to do so does not rise to a clearly established constitutional violation." Hannula, 907 F.2d at 132.

Judge Surrick also noted three cases in which qualified immunity was granted to police officers where tight handcuffing was involved, *citing* Greiner v. City of Champlin, 27 F.3d 1346 (8th Cir. 1994); Hoffa v. Township of Colebrookdale, 1999 WL 55171, 1999 U.S. Dist. LEXIS 381 (E.D. Pa. 1999); and Cooper v. City of Virginia Beach, 817 F. Supp. 1310 (E.D. Va. 1993).

The underlying decision which was affirmed by the Eighth Circuit Court of Appeals in Greiner was cited in Nelson v. Mattern, 844 F. Supp. 216 (E.D. Pa. 1994) was cited to illustrate "the fact-specific nature of the excessive force analysis." The Nelson Court characterized the Greiner decision as holding "that tight handcuffs and pushing suspects was justified where suspects were intoxicated and resisting arrest." Nelson, 844 F. Supp., at 222, *citing*, Greiner v. City of Champlin, 816 F. Supp. 528, 542 (D. Minn., 1993).

Intermediate Positions

Other cases have taken an intermediate position on the question of whether an excessive force claim can arise from tight handcuffs. In Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), the Sixth Circuit Court of Appeals held that an excessive use of force claim could be premised on the officer handcuffing the prisoner if: first, the officer knew the prisoner had an injury; and second, if the officer also believed that the prisoner posed no threat. Walton, at 1342.

If Walton were applied to these facts, no excessive force claim would exist because Officer Rogge testified that he did not know the exact nature of the plaintiff's alleged disability, and specifically, did not know that they involved the plaintiff's arms, nor was he aware of any disability related to the plaintiff's back:

Q: You knew from what he told you at the arrest that he had tendonitis, bursitis and some type of arthritic condition.

A: I knew there was some conditions, yes, I did.

Q: ***And you knew they involved his upper extremities, correct?***

A: ***I wasn't exactly sure where they related to.***

* * *

Q: And you also were aware that Mr. Istvanik had a lower back problem?

A: I wasn't aware of that.

Q: You were not aware of that.

A: To the best of my recollection.

(10/10/00 at 55-56) Also, the plaintiff also continued to be a threat to himself.

Both Officer Rogge and Officer Lawn testified that it is dangerous for the plaintiff to be hiding from the cameras by going under the bunk in the cell. Officer Rogge testified why the plaintiff was not permitted to evade the cameras: "I don't know what he's doing underneath there. He could be doing any number of things to harm himself. And I need to see him to take care of him."(10/10/00 at 25)

Officer Lawn echoed that same concern:

Q: Is there a concern that if the person, and out of concern that if the person hiding under the bunk is intoxicated?

A: Sure. Drunk people sometimes throw up. If he went under there he could asphyxiate on his vomit. And we wouldn't have been able to know what was going on under there.

(Id. at 105-106.) Finally, even the plaintiff's own expert, John G. Peters, agreed that a prisoner who continued to crawl underneath the bunk posed a threat to himself.

Q: How about if you're monitoring somebody and the one handcuff is

applied and they crawl under the bunk, what risk is there if an intoxicated person is laying flat on their back, under the bunk and you can't see them?

A: There's a risk that the person could probably vomit and possibly asphyxiate on that...

(10/4/00 at 149.) Mr. Peters also testified that the configuration which Officers Rogge and Lawn used in securing the plaintiff afforded him greater comfort.

Q: Do you agree that the use of two handcuffs was actually to afford Mr. Istvanik greater comfort because his arms would not be pulled so tightly behind his back?

A: As a general rule the use of two handcuffs do that. They do allow the arms to be further apart.

Q: And that's what was done in this case?

A: That's what was done in this case, it's my understanding, yes.

(Id., at 152.) So, had Walton been the applicable law, no violation would exist, based on an individualized assessment of the facts of this case. Not only was Officer Rogge unaware of the plaintiff's alleged disabilities, but the plaintiff also continued to represent a danger, necessitating that he be secure.

The Eleventh Circuit case of Rodriguez v. Farrell, 280 F.3d 1341 (11th Cir. 2002) presents another intermediate view of the question of excessive force handcuffing and also displays the extent to which the law in this area remains to this day, not "clearly established." In Rodriguez, after a traffic stop, two police officers arrested the plaintiff pursuant to a valid warrant which, it turned out, was issued for a different individual.

In the course of making the arrest, the plaintiff's arm was twisted behind his back and jerked up to his shoulder. Rodriguez, 280 F.3d at 1351. The plaintiff screamed. Unbeknownst to the arresting officer, the plaintiff had recently undergone significant orthopedic shoulder surgery. Id. As a result of the handcuffing, the plaintiff's internal surgical hardware was loosened, and a key bone fragment was displaced. Id. Over twenty-five surgeries followed in an attempt to correct the problem, which were ultimately unsuccessful and resulted in the plaintiff's arm being amputated below the elbow. Id.

In reversing the district court's denial of summary judgment, the Court first noted that "[p]ainful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." Id., at 1351, *citing*, Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000); Brissett v. Paul, 141 F.3d 1157 (4th 1998) (table); Foster v. Metropolitan Airports Comm'n, 914 F.2d 1076 (8th Cir. 1990); Martin v. Gentile, 849 F.2d 863 (4th Cir. 1988); Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982).

The Court then recognized that the plaintiff's surgery changed the situation, somewhat, by virtue of the negative consequences. "This case is different from Nolin because [plaintiff's] earlier surgery made what otherwise would have

been a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results." Rodriguez, at 1351.

This distinction, and the devastating injuries which resulted, was found by the Court to be legally irrelevant for purposes of determining whether excessive force was used:

> [N]o evidence has been presented that [the arresting officer] knew of plaintiff's recent elbow surgery or, more importantly, knew that handcuffing plaintiff would seriously aggravate plaintiff's preexisting condition. We do no use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time.

Id., at 1351-1353, (footnote omitted.) Likewise, in this case, there was no evidence or testimony presented which showed that Officer Rogge knew of the exact nature of the plaintiff's ailments or, more importantly, that he knew that the double cuffing necessary to secure and protect the plaintiff could aggravate these ailments.

Other courts have taken this intermediate position, that handcuffing could possibly constitute excessive force, depending upon the knowledge of the officer or the extent of injury.

In Carter v. Morris, 164 F.3d 215 (4th Cir. 1999), the court stated that the plaintiff's excessive force claim based on tight handcuffing was "so insubstantial that it cannot as a matter of law support her claim under the Fourth Amendment...or the Fourteenth." Carter, 164 F.3d at 219, n3 (internal citations omitted); see, also, White v. Maryland Transportation Auth., 151 F. Supp. 2d 651, 657 (D.Md. 2001). The Court in Carter cited, as support, Martin v. Gentile, supra., and Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997). In Riley, as in Carter, the court took an intermediate position and affirmed the grant of qualified immunity where the painful handcuffing claim produced no injury. Riley, at 1167.

In Gonzalez v. Benito, 1994 U.S. App. LEXIS 25609 (1st Cir. 1994) (unpub.), the court held that "tight handcuffs standing alone are not enough to proceed to trial on a constitutional claim." Gonzalez at *4. In Gold v. City of Miami, 121 F.3d 1442 (11th Cir. 1997), the Eleventh Circuit Court of Appeals also affirmed the granting of qualified immunity, even though the plaintiff experienced pain and minor injuries. Gold, at 1446-1447. The Court stated that the circumstances would not "inevitably lead" an officer to conclude that his use force was unlawful. Id.

Distinguishable Cases

The district court's opinion cites a number of cases which support the view that a constitutional claim can arise from handcuffing. The plaintiff, in his petition, highlights a number of those cases, and other cases which he believes supports the conclusion that the law was well settled. However, upon closer examination, some of those cases do not really provide the support for his position that the plaintiff was suggesting.

For example, the plaintiff cites to Williams v. Benjamin, 77 F.3d 756 (4th Cir. 1996) and Landman v. Royster, 333 F. Supp. 621 (E.D.Va. 1971), for the contention that "handcuffing an inmate in his cell to restrain or control misbehavior was unconstitutionally excessive." (Petition at 13.) However, in both of these cases, the use of restraints was not done to protect the detainee from harming himself, as was the case here, but was used as corporal punishment for misbehavior. Williams, at 765-766; Landman at 647-648. The use of handcuffs in this case was not done to punish the plaintiff, but to protect him.

Similarly, in Casaburro v. Guiliani, 986 F. Supp. 176 (S.D.N.Y. 1997), the plaintiff alleged that the police improperly used handcuffs on him as a punishment. Casaburro, at 178-179. The Court, examining the claim under the Eighth Amendment, specifically addressed the fact that there was no need to handcuff the plaintiff in his cell. Id. Here, the plaintiff continued to present a danger to himself, necessitating restraint. Indeed, not only did Officers Rogge and Lawn not use the handcuffs as a form of punishment, but they actually used the double-cuff technique specifically because it allowed for additional comfort for the plaintiff.

Finally, the plaintiff attempts to analogize this case to Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508 (2002). The plaintiff views the only difference between Hope and this case is that in Hope, the plaintiff was attached to a hitching post. (Petition, at 11, n10.) In fact, in Hope, this Court's determination was made under the Eighth Amendment and the question before the Court was whether the actions taken against the plaintiff, as punishment for previous transgressions, was cruel and unusual punishment. In this case, the handcuffs were not used as a punitive measure.

The plaintiff provided a quotation from Hope in his footnote 10. Filling in the ellipses, this Court indicated, "Nor, ***for the purpose of providing fair notice to reasonable officers administering punishment for past conduct***, is there any reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for a prolonged period and handcuffing him to a hitching post for seven hours." Hope, at 122 S.Ct. at 2517, emphasis supplied. Since the double handcuffing performed in this case was not done by the officers "administering punishment for past conduct," Hope is clearly distinguishable.

Conclusion

All the cases examined by the district court as well as those addressed here show that there was great disagreement as to whether, and to what extent, an excessive force claim can be based on handcuffing. The Court of Appeals affirmed that view:

> We find no error in the district court's Saucier analysis. Quite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving.

(Opinion at 6a.)

The plaintiff seems to suggest that the court should have evaluated these conflicting cases and made a determination as to what the law should be, or to declare the right "clearly established" if some circuit courts find that an

excessive force claim can arise from tight handcuffing. The court's role under Saucier, however, is only to determine if the law was "clearly established.". Where, as here, the various courts' resolutions to this issue have not only fallen at both ends of the question, but also at intermediate points as well, the right is not "clearly established."

While the plaintiff can point to case law which characterizes tight handcuffing as a constitutional violation, the fact that other cases hold otherwise or come to some intermediate position, is important because this lack of uniformity, is the key to the decision, as it is proof that the right has yet to be clearly established.

The question under the second prong of the Saucier test does not ask what the law should be, but whether it has been clearly established. And here, the law was not clearly established.

As the district court noted, this is one of the areas in which qualified immunity is specifically designed to apply:

> From a review of the case law, it is clear that tight handcuffing is a perfect example of the Supreme Court's warning in Saucier v. Katz that "Graham['s objective reasonableness standard] does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." Saucier, 121 S. Ct. at 2158. The doctrine of qualified immunity exists to protect law enforcement officials from exactly the type of muddied legal waters apparent in the case law concerning the use of tight handcuffs.

(Opinion at 21.) As Judge Surrick concluded, under all of the facts in this case, "[t]o conclude that Officer Rogge was plainly incompetent or that he knowingly violated the law is simply not justified in the totality of this case."(Opinion at 25.)

Because the question of whether tight handcuffing as a potential basis for an excessive force claim was not, and still is not, clearly established, a reasonable officer in Officer Rogge's position could have reasonably believed that the actions that he took in securing the plaintiff was permissible and lawful. Since that is the case, there was no error in the trial court's opinion granting Officer Rogge qualified immunity.

C. This Court Needs Not Address The Split Among The Circuits On Whether To Examine Law From Outside The Circuit When Deciding Whether The Law Has Been Clearly Established With This Case, Because The Result Is The Same No Matter What Standard Is Applied.

The other issue presented by the plaintiff in requesting a writ of certiorari is what weight is to be given to cases arising outside the circuit when there is no controlling authority in the circuit in which the case arose. The courts of appeals have developed a number of approaches to answer this question. In Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998), *overruled, in part, on other grounds, in* DeHart v. Horn, 227 F.3d 47, 54-55 (3d Cir. 2000), the Third Circuit noted that "the courts of appeals are divided as to whether, and to what extent, out-of-circuit decisions may be considered

in determining whether the law was clearly established." Johnson, at 286. Three approaches were detailed:

1) Decisions from other courts of appeals may be considered. This approach is followed by the Tenth, Second, Eighth, Seventh, and Ninth circuits. Id., at 286, n6, citing, Baptiste v. J.C. Penney Co., 147 F.3d 1252 (10th Cir. 1998); Varrone v. Bilotti, 123 F.3d 75, 78 (2d Cir. 1997); Norfleet ex rel. Norfleet v. Arkansas Dep't of Human Servs., 989 F.2d 289, 291 (8th Cir. 1993). Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989); Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989), respectively.

2) Decisions from other circuits may only considered in exceptional circumstances. This approach is followed by the Fourth and Sixth circuits. Johnson, at 286, citing, Wilson v. Layne, 141 F.3d 111, 117 (4th Cir. 1998) (en banc); Cope v. Heltsley, 128 F.3d 452, 459 (6th Cir. 1997) (en banc), respectively.

3) Decisions from other circuits may never be considered. This approach is followed by the Eleventh and Fifth circuits. Johnson, at 286, citing, Jenkins ex rel. Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 823 & n.4 (11th Cir.), cert. denied sub nom.

Jenkins ex rel. Hall v. Herring, 139 L. Ed. 2d 315, 118 S. Ct. 412 (1997); Brady v. Fort Bend County, 58 F.3d 173, 175 (5th Cir. 1995), respectively.

In this case, the district court examined the state of the law as it exists in other circuits. The Third Circuit Court of Appeals affirmed and approved that decision. Thus, the Third Circuit can safely be placed in the first category.

In the plaintiff's petition to this Court, the apparent split in the circuits is grouped differently.

The broadest interpretation is credited to the Eighth and Ninth Circuits, which would consider all case law, citing Hayes v. Long, 72 F.3d 70, 73-74 (8th 1995) and Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988). The Second, Third, and Seventh Circuits, will look to decisions by the district courts, but will not permit them to establish the law, citing Jermosen v. Smith, 945 F.2d 547, 551 (2d Cir. 1991); Threadgill v. Armstrong World Indus. Inc., 928 F.2d 1366, 1371 (3d Cir. 1991); and Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995).

A narrower approach is exemplified by the Fourth and Eleventh Circuits, which allow decisions by this Court, the respective circuit courts, and the state's highest court to be considered, citing Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998), cert. denied, 531 U.S. 1076 (2001) (en banc); Jenkins, supra. Finally, the strictest approach is followed by the Sixth Circuit, which considers only decisions by this Court, the Sixth Circuit Court of Appeals and the district court itself, citing Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1171 (6th Cir. 1988).

Regardless of precisely how the various approaches are categorized and classified, these decisions form a continuum with a broad examination of all case law at one end, and a very narrow examination at the other. The precise classification is unimportant in this particular case because the district court examined the law using the very broadest standard-examining circuit and district court cases from out of the circuit-and yet found that the law was not clearly established. If the law is examined under any of the narrower standards, regardless of whether the Johnson classification or the plaintiff's classification is used, the conclusion is the same: Officer Rogge is entitled to qualified immunity.

Under different facts, this split could pose an interesting question of law for this Court to consider. However, under the facts of this case, it would merely be an academic exercise, as Officer Rogge is entitled to qualified immunity regardless of the standard applied.

The broadest approach allows for the consideration of other circuits' decisions, including district court cases. This was the standard employed by the district court in this case. Under that approach, Officer Rogge was found to be entitled to qualified immunity because the law in this area is not clearly defined, even on a general level, as the previous section of this opposition details.

Had the court favored a narrower approach, Officer Rogge would again be entitled to qualified immunity. For example, under the Sixth Circuit's view as detailed in Cope, supra, case law from outside the circuit can embody clearly established law, but "such decisions must both point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his

conduct was unconstitutional." Cope at 459, n4. Given the conflicting nature of the authorities in this case, they do not "point unmistakenly to the unconstitutionality" of the use of handcuffs to restrain the plaintiff in this case. That, coupled with a lack of direct precedent by the Third Circuit or this Court, would require a finding that Officer Rogge is entitled to qualified immunity under this narrower approach.

Finally, had the narrowest approach been employed, which only finds a right to be clearly established if it is based on precedent from this Court, or the particular circuit's court of appeals, Officer Rogge would be entitled to qualified immunity. There is no precedent from this Court or the Third Circuit Court of Appeals on whether or to what extent an excessive force claim can stem from the use of a double set of handcuffs to restrain a drunken and uncooperative detainee for his own protection. Since that is the case, under the narrowest approach, the law is not clearly established, and the officer is entitled to qualified immunity.

These approaches differ, but regardless of how narrow or broad the approach, the result is the same under the particular facts of this case-Officer Rogge is entitled to qualified immunity.

In this case, the district court and the Third Circuit Court of Appeals examined this case under the broadest possible standard. Cases were considered even though they were from different circuits, and even though they were district court cases. The court concluded that the law had not been clearly established. Under a more strict standard, one that primarily or exclusively looked to that circuit's jurisprudence, the result would be even less in doubt, because there was no Third Circuit case on this issue.

This Court should deny the plaintiff's petition for a writ of certiorari because this Court's examination of the question would necessarily be an academic one. If this Court were inclined to examine this issue, it would be better suited to wait, and do so in a case where the degree of scrutiny that an out-of-circuit case receives might make a difference in whether immunity is granted. The Third Circuit Court of Appeals in Johnson refused to adopt any particular approach, because under each of them, the result was the same. After noting that the courts held divergent opinions regarding the use of out-of-circuit decisions, the Court stated, "[w]e need not answer this difficult question, because we conclude that, under any standard, the law entitling the Inmates to a kosher diet was not clearly established when [defendants] refused the Inmates' request for kosher meals." Johnson, at 286.

Because Officer Rogge will be entitled to qualified immunity regardless of how the question is answered, he should not be forced to continue this case in order for the question to result in, essentially, an advisory opinion by this Court. Cf. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566, 97 S.Ct. 2849 (1977) (declining exercise of jurisdiction where adequate and independent state grounds existed because, in part, "if the same judgment would be rendered by the state court, after we corrected its view of federal law, our review could amount to nothing more than an advisory opinion.")

III. CONCLUSION

For all of the foregoing reasons, this Court is respectfully requested to deny the plaintiff's Petition for Writ of Certiorari.

Respectfully Submitted,

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